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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 NORTHWEST BIOTHERAPEUTICS,
4 INC.,

5 Plaintiff,

6 v.

22 Civ. 10185 (GHW) (GS)

7 CANACCORD GENUITY LLC, CITADEL
8 SECURITIES LLC, G1 EXECUTION
9 SERVICES LLC, GTS SECURITIES
LLC, INSTINET LLC, LIME
TRADING CORP. and VIRTU
AMERICAS LLC,

10 Defendants.

11 Oral Argument

12 -----x
13 New York, N.Y.
14 November 14, 2023
15 10:30 a.m.

16 Before:

17 HON. GARY STEIN,

18 U.S. Magistrate Judge

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1 (Case called; appearances noted)

2 THE COURT: Good morning. You may be seated.

3 Well, thanks, everybody, for coming in. I felt the
4 issues in this case were sufficiently complex and
5 sufficiently -- indeed, hotly -- contested that oral argument
6 would be appropriate. I do have a number of specific
7 questions, but I also want to give each side an opportunity to
8 present their view of the case and why they think I should rule
9 in their favor.

10 Since this is defendants' motion, we'll begin with
11 you, Mr. Burck.

12 MR. BURCK: Thank you, your Honor.

13 Your Honor, we have a presentation, or a slide deck,
14 that we'd like to use to help guide our arguments today. It's
15 entirely drawn from our briefs and the appendices, exhibits and
16 public data that we've referenced in those briefs. We've
17 notified plaintiff's counsel, and they didn't object to the
18 presentation. They haven't seen it, but we told them this is
19 all drawn from our briefs.

20 THE COURT: No objection, Ms. Posner?

21 MS. POSNER: No objection.

22 THE COURT: OK.

23 Very well.

24 MR. BURCK: Thank you, your Honor.

25 Your Honor, if I may, I'll hand up a hard copy for the

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1 Court. We'll have it on screen as well.

2 THE COURT: You may approach.

3 MR. BURCK: Your Honor, Derek Lewis is the gentleman
4 sitting right beside me. He's going to be operating the
5 audiovisual extravaganza we have here.

6 THE COURT: Good morning, Mr. Lewis.

7 MR. LEWIS: Good morning.

8 MR. BURCK: Your Honor, we'll start with slide 2, and
9 your Honor, this is really a road map for what we'd like to
10 discuss on our side this morning.

11 Before I go into the road map, just in a nutshell,
12 from the defendants' perspective, your Honor, this is a case
13 about the plaintiffs trying to turn regular market activity,
14 normal behavior by market makers into wide scale, unbounded
15 spoofing. And we'll go through each of the elements of the
16 PSLRA. Each one of these, of course, is required under the
17 PSLRA to be met in order for the case to survive the motion to
18 dismiss. In each of these, in this case, the plaintiffs fail,
19 and they fail badly.

20 Judge, they've had two opportunities here. They had
21 an original complaint, which they then amended, based on a Rule
22 11 letter that we sent to them that pointed out the severe
23 factual mistakes in their complaint. And then in their new
24 complaint, their amended complaint, which we'll go into detail
25 today, they simply erased a lot of those facts. They didn't

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1 correct them. They just ignored them, and they expanded their
2 theory in a way that went from normal spoofing into some kind
3 of new spoofing that no one's ever heard of, your Honor. So
4 I'll go through each of these elements, your Honor, and the
5 deck will go through it in this order. But let's just start
6 with scienter.

7 Obviously scienter is a critical aspect of the
8 heightened and exacting pleading standards required by the
9 PSLRA. We will demonstrate, and we have demonstrated, that
10 they have not even come close to meeting that standard, your
11 Honor.

12 Manipulative acts. Again, they can't even explain
13 what the manipulative acts are. Even taking their facts as
14 alleged and assuming them to be true -- assuming them to be
15 true -- it means that there was no spoofing. There were no
16 manipulative acts.

17 We'll also go into loss causation, and the loss
18 causation in this case, your Honor -- we'll go into this a
19 bit -- the actual purchases by the plaintiffs in this case
20 occurred, as they admit, on closing dates, because they're a
21 publicly traded company; they have to buy on closing dates.
22 All of those closing dates that we've seen, with one exception,
23 didn't even happen on the same day as the spoofing allegations
24 that they said occurred, and the one day that it did, it
25 happened six-plus hours after the spoofing incident occurred.

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1 And more importantly, potentially, your Honor, is the fact that
2 the stock price during this five-year period that they allege
3 doubled in price. So the price didn't go down. It doubled.
4 They are, of course, alleging that the spoofing here was
5 designed to drive the price down. So this spoofing that they
6 allege not only didn't happen, if there was an attempt, it was
7 one of the worst attempts in history.

8 The *Harrington* case, which I'm sure will come up, from
9 the court, in that case the price went down 90 percent in the
10 alleged period. This is a very different scenario. Plus, of
11 course, in that case, we'll learn this as well, we're talking
12 about trading that occurred in milliseconds, which is normal
13 trading for market makers in 2023. In this case, all the
14 spoofing they're alleging happened in minutes, two minutes,
15 three minutes, which, as the Court knows, is an eternity when
16 it comes to this type of trading.

17 And finally, your Honor, we will talk about the
18 reliance on efficient market theory, which is a necessary
19 component as well. The plaintiffs allege that the OTC Link
20 market or this OTC market is an efficient market. They say
21 courts have held that. The Court, I'm sure, has read the cases
22 himself. The courts do not say that. The courts have said
23 either that it is not an efficient market or they don't reach
24 the issue.

25 THE COURT: But there's a lot of cases on that.

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1 Just so we can level set, you prefaced this slide by
2 saying these are the different things required under the PSLRA,
3 but just to make sure we're on the same page, the PSLRA
4 absolutely says something about scienter as the heightened
5 standard. Not so for any of the other three elements, correct?
6 Because the PSLRA's heightened pleading standard for
7 misstatements and omissions does not apply in a manipulation
8 case.

9 MR. BURCK: That's right, your Honor, and this is not
10 a misrepresentations case.

11 THE COURT: Yes.

12 MR. BURCK: That's 100 percent right, your Honor. We
13 believe that these are the factors that should guide the
14 Court's thinking about the case, but of course, scienter is the
15 key issue, up-front issue.

16 THE COURT: And 9(b), to be sure.

17 MR. BURCK: 9(b).

18 THE COURT: Manipulative acts.

19 MR. BURCK: Exactly. Exactly, your Honor.

20 THE COURT: OK.

21 MR. BURCK: Next slide, please.

22 First, your Honor, we just want to level set on what
23 spoofing is. It's a well-understood concept. It's something
24 that everybody in the market knows, and it's a pretty simple
25 concept. Spoofing is when thespoofers decides that they're

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1 going to ask for a price that's above the market price, at a
2 particular moment, not with the intent to actually sell the
3 shares at that price but to create the impression in the market
4 that there's some pressure to sell. In fact, the spoofe
5 doesn't want to actually sell because it's giving a price
6 that's higher than the market, so of course, they don't want to
7 actually sell it. They just want to create a sense that
8 there's a pressure on the stock. So they put a price that is
9 slightly above the market price. They, again, have no intent
10 to sell those shares.

11 The pressure created by this, these very fast trades
12 at this slightly above-market price creates the downward price
13 pressure on the stock, because people think that somebody wants
14 to sell this stock, and you start seeing the price fall. But
15 it's an artificial fall because, again, the purpose of the
16 spoofe is not to actually sell. It's to create the impression
17 that there's a pressure to sell.

18 THE COURT: I'm a little confused, maybe
19 embarrassingly, but you say in a real spoofing case, the
20 spoofe, if it wants to drive the market price downwards,
21 places offers to sell above the market price --

22 MR. BURCK: Exactly.

23 THE COURT: -- or below?

24 MR. BURCK: Above, because the idea is that they're
25 trying to create the impression that there is an actual sale.

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1 They're not doing it massively above. They're doing it a
2 little bit above so that they create an impression that
3 there's -- and again, the key thing here, your Honor, is they
4 don't intend to sell it. So in other words, they don't have to
5 sell. They can put out an ask price. They don't have to sell
6 it, and so the idea is to create the impression that there's a
7 desire to sell the shares. But again, the key point is that
8 they don't intend to sell. That's what the spoofer's goal is.

9 The spoofer's goal is not to actually sell, and in
10 fact, in spoofing, they don't sell for exactly the reason
11 you're talking about, your Honor, because it is a little bit
12 counterintuitive in the sense that you think, well, if I'm
13 going to offer to sell the stock at a higher price than the
14 market, a bunch of people are going to want to do that on the
15 other side. But the reality here is the person offering to
16 sell doesn't want to do that. That's not the point. The point
17 is to create the impression that somebody in the market thinks
18 I want to sell, and you get other people in the market starting
19 to sell, and then the prices start going down as you have
20 people coming into the market more on the sell side than on the
21 buy side.

22 So the idea here is that the price starts coming down
23 as there are more sell orders, or asks for sell, offers to
24 sell, and then, when the price is depressed, the spoofer will
25 buy the stock at the depressed price that's been created by the

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1 false impression that they were willing to sell at a slightly
2 higher price that then caused the increase in sale orders in
3 the market. And they'll buy it at the lower price and that's
4 an artificially low price because, again, it all started from
5 the spoofer deciding I'm going to pretend like I'm going to
6 sell but I'm not going to sell.

7 And the key, final bit of spoofing -- that's stage
8 three here, your Honor -- is that the spoofer cancels the
9 deceptive sell orders because, again, the spoofer has no intent
10 to actually sell the stock at the slightly inflated price
11 because that will actually be a bad decision for them from an
12 economic perspective. So again, they put it a little bit above
13 the market to create the impression that they want to sell.
14 They get other people in the market to decide to sell. The
15 price comes down. They wait until the price hits a certain
16 artificially low point, they jump and they buy the stock, and
17 then they cancel all their original sell orders.

18 So that is spoofing. That is classic spoofing. I
19 don't think that the plaintiffs would disagree with that. In
20 fact, that's their case. That's effectively what they're
21 saying.

22 THE COURT: That's what they've alleged.

23 MR. BURCK: Exactly, your Honor.

24 We can go to the next slide.

25 Let me go through exactly what they allege, and that

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1 is parallel to what I just mentioned, your Honor.

2 Stage one, this is what the plaintiffs say. Each
3 defendant separately displayed multiple baiting orders. The
4 baiting order is the fake order to sell. I want to sell a
5 little bit above. I want to get people into the market. I'm
6 not actually planning to do that. And they don't intend to
7 execute. They don't actually intend to sell the stock.

8 Baiting orders were parked, and I'll explain parking
9 in a bit. Parking is the idea of hiding it right behind
10 somebody else who is not involved in the scheme but who has a
11 slightly higher price, as the market is moving around, so that
12 you can hide the order there so that it then -- you can
13 basically further the scheme by hiding it, by parking. Again,
14 we'll get into that in a little more detail.

15 Stage two, defendants' baiting orders drove down the
16 price. This is what we were talking about, the spoofing, the
17 impression of interest in selling in the market so other people
18 can start putting bids out there or asks out there, and the
19 price starts going down. And then the defendants, according to
20 the plaintiff -- and we're not sure if it's on behalf of
21 clients or on behalf of themselves; they say it could be either
22 one, they're not really sure -- bought the stock at that lower
23 price. That's the spoofing. That's where you get the economic
24 value from the scheme.

25 And then stage three, and this is over a two-minute

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1 period, your Honor, not milliseconds, unlike every other case
2 that has survived a motion to dismiss -- every other case. In
3 two minutes, the defendant decides to cancel baiting orders and
4 so they would not actually have to sell the shares at the price
5 that they had originally put them at, which, of course, they
6 wouldn't want to because that price is now too high.

7 So that is what they allege, your Honor, and that is
8 classic spoofing.

9 Next slide, please.

10 And this slide, your Honor, we're going to go into a
11 fair bit more detail, but this is actually what they allege
12 factually, and this is also what they rely on. This is taken
13 from what they rely on in their complaint and in their
14 briefing, from the public data about these trades. What
15 actually happened is that the defendants' prices -- and this is
16 taken from public data, your Honor -- were competitive with the
17 market price. In fact, they're often much lower -- and we'll
18 go into that in a minute, your Honor -- much lower than the
19 market price. And the defendants' orders were not behind other
20 orders. They were not parked in any sense of the word, and
21 there are a number of reasons for that, but they were never
22 parked.

23 For stage two, there is no actual allegation of a
24 price decline in this case, your Honor. In fact, the record
25 shows it doubled. But more importantly, your Honor, they don't

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1 actually, the plaintiffs don't actually allege what the price
2 was before the spoofing started. There's literally nothing.
3 In the first complaint, they said that this price was
4 something -- we'll go into that -- it was X, and then it was
5 pointed out to them they were wrong. And so in this complaint,
6 rather than try to find the right price, and we'll tell you
7 what the right price was, based on public data, they just take
8 it out. So we have actually no understanding of what the price
9 was, what the spoofing effect was on the price. And that, of
10 course, is a requirement by the Second Circuit under *ATSI*. And
11 in fact, of course, the share price went up during this entire
12 period.

13 Stage three, they allege, your Honor, that orders may
14 have been canceled -- may have been canceled. Your Honor, they
15 cannot point to a single, solitary instance in which an order
16 was canceled in their entire complaint, not one by any of the
17 defendants. They also said originally that defendants did not
18 sell any shares because, of course, that's a key part of the
19 spoofer's scheme. It doesn't make any sense to spoof and then
20 sell at the higher price, because now you're losing money. In
21 fact, public data shows defendants did sell shares during this
22 period.

23 So the allegations that they've actually made, and
24 this is actually drawn from their complaint, because they say
25 may have done this, they may have sold, they may not have sold,

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1 they may have canceled, they may not have canceled, it doesn't
2 matter, your Honor, because ultimately what they were doing is
3 spoofing. Of course, if they did all of these things, which,
4 again, the public data shows, and they even admit in their
5 factual allegations, it can't be spoofing.

6 Next slide, please.

7 Your Honor, we'll start with, as the Court pointed
8 out, the key issue under the PSLRA, scienter. And we have a
9 quote here. We thought it was just important to have it up
10 there. The only factor that distinguishes legitimate trading
11 from improper manipulation is often scienter. And especially
12 in a spoofing case, that is critical because, again, the
13 spoofing has to start with the intent not to sell; that they're
14 just going to put out a fake number and start the process of
15 getting people to think that there's a sale process going on.

16 You cannot have market manipulation without intent,
17 and where there's no motive -- and we'll go into the motive
18 issue in a minute -- the circumstantial allegations have to be
19 that much more enhanced to meet the standards of the PSLRA.

20 The plaintiffs fall woefully short on both of those
21 counts.

22 Next slide.

23 So first, your Honor, we're going to go through a bit
24 about what their allegations are and explain how the
25 allegations don't make sense on the face of the complaint and

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1 also are belied by the actual public data on the trades.

2 As I mentioned earlier, the defendants say that these
3 market makers may have been trading for clients and maybe they
4 were trading for themselves. It doesn't matter, from their
5 perspective, because ultimately it's spoofing. Well, of
6 course, if they're trading for clients, your Honor, if the
7 defendants are trading for clients, then they have to be doing
8 spoofing for those clients. They have to be actually doing it
9 for a specific client on both sides of the trade, on both the
10 fake sale and then the actual purchase and then the
11 cancellation. So that has to be what they're doing. There has
12 to be a conspiracy effectively with the clients. They, of
13 course, don't allege that. They simply say, well, it could
14 have been for clients, but they don't allege that any clients
15 were actually part of this scheme.

16 THE COURT: That's the same as *Harrington*, isn't it?

17 MR. BURCK: That is the exact --

18 THE COURT: *Harrington II*.

19 MR. BURCK: *Harrington II*, right. And your Honor, in
20 that case --

21 THE COURT: Are you suggesting I should disagree with
22 Judge Schofield on that issue?

23 MR. BURCK: Well, your Honor, actually, we don't think
24 you have to disagree with Judge Schofield. We don't
25 necessarily agree with *Harrington II*, but we don't think that

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1 Harrington has anything to do with the facts that are alleged
2 in this case. The facts alleged in *Harrington* -- and I can go
3 into that.

4 THE COURT: No. I understand you have a myriad of
5 ways of distinguishing *Harrington II*, but on this particular
6 issue, which is that the trading was or may have been done on
7 behalf of clients, was not a point that Judge Schofield
8 believed was fatal to the complaint.

9 MR. BURCK: Well, I think, your Honor, in that case
10 the idea was that the defendants in that case were getting some
11 kind of benefit from the spoofing that they were assisting
12 clients with, and the idea was --

13 THE COURT: To make clients happy.

14 MR. BURCK: Make clients happy.

15 THE COURT: Why would it be different here?

16 MR. BURCK: Well, Judge, there are many difference,
17 but one difference here is that in this case, when we're
18 talking about the actual trades, the facts of this particular
19 case, putting aside *Harrington's* which are about millisecond
20 trades and a whole other scheme to evade regulators, here you'd
21 be saying that these market makers who have people on both
22 sides of a trade -- right? When they're market making, they
23 have people that are buying and people that are selling. In
24 this case, there's no allegation that the clients were the same
25 people on either side. There's no allegation that when they

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1 were doing this alleged spoofing, that the client that they
2 were -- no allegation, your Honor, not even -- we're going to
3 go to the facts. They don't even say the same person was
4 trying to do a spoofing, meaning they were trying to put up a
5 bid at a higher price and then purchase at a lower price and
6 then cancel their orders.

7 THE COURT: Are you saying there was such an
8 allegation in *Harrington II*?

9 MR. BURCK: I believe so, your Honor. I believe that
10 it was at least something that was alleged in that case. It's
11 definitely not alleged in this case.

12 THE COURT: I don't know how the plaintiff either in
13 *Harrington II* or in this case could know?

14 MR. BURCK: Well, your Honor, they don't allege it.
15 So it's not even a question of whether they could know. They
16 have to allege that they believe, on information and belief,
17 for example, that they were doing this on behalf of X client or
18 Y client or Does. In fact, in the *Kessev Tov* case, there was a
19 relaxed standard because they were saying that we don't know
20 who's actually doing this, the Does are doing it; we're going
21 to find out.

22 Here, they don't allege in any way that there was a
23 client on both sides, and if they don't allege it, your Honor,
24 they can't prove spoofing. They can't even meet the standard.
25 It's not the defendants' burden to tell them, well, you should

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1 have said that it was either an identified client or a John Doe
2 client or a Jane Doe client who you were doing it for. They
3 just skip over it entirely, your Honor.

4 THE COURT: Will you let me know where in the
5 *Harrington* --

6 MR. BURCK: Yes.

7 THE COURT: -- amended complaint or the opinion
8 there's an allegation that the plaintiffs knew or had
9 identified or alleged who the specific clients were?

10 MR. BURCK: We'll definitely check that, your Honor.
11 I'm not saying that they identified them. I'm saying I believe
12 there was an allegation, that it was on behalf of clients who
13 were on both sides.

14 THE COURT: Well, isn't that the reasonable inference
15 to be drawn? To the extent the complaint here alleges that the
16 trading was on behalf of clients, you would think that if the
17 spoofing was done on behalf of clients; it would follow from
18 that allegation or at least certainly a reasonable inference
19 from it is that it was done on behalf of the same client.

20 MR. BURCK: Well, your Honor, first of all, I think
21 that they'd have to allege that. And I think that the way the
22 actual markets work here and the way that their customer, the
23 actual customer base that the plaintiffs well know, there are
24 thousands and thousands of people on both sides of these
25 trades, and whenever Citadel or any of the other defendants

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1 decides they're going to help a spoofer, they're hurting their
2 buy side people.

3 So the question is why would -- and they don't allege
4 this either, your Honor. Why would Citadel decide, you know
5 what, one day here's what we're going to do. We're going to
6 help our sell side people. Right? We're going to help our
7 sell side and our spoofers, we're going to hurt our buy side
8 people. Why would they do that? What would be the reason for
9 that?

10 The way they make money is on fees and commissions off
11 of trading. Trading up, down. Doesn't matter to them. They
12 make it off of the fees, commissions for trades. There's no
13 allegation, your Honor, at all that they had any motive to
14 favor spoofers over nonspoofers in the market. They didn't
15 make any more money from helping somebody spoof.

16 THE COURT: So with regard to the specific argument
17 you're now making, how do you distinguish that from *Harrington*,
18 your argument that there's no motive because market makers are
19 on both sides?

20 MR. BURCK: Your Honor, let me address *Harrington* in
21 some detail.

22 THE COURT: No. I don't want to interrupt your flow.

23 MR. BURCK: No, it's fine.

24 THE COURT: I understand you have other ways of
25 distinguishing *Harrington*. I'm trying to focus on the specific

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1 claims you're making.

2 MR. BURCK: Well, your Honor, I don't think you can
3 divorce *Harrington* and the client issue from the underlying,
4 the facts that the court looked at to determine that it could
5 get past the motion to dismiss, which are completely different
6 than here, because for example, in that case --

7 THE COURT: I read your letter.

8 MR. BURCK: Right.

9 THE COURT: I'd rather get to those points.

10 MR. BURCK: Fine, your Honor. I'll get to those. If
11 you want, I can just continue and then we'll get to *Harrington*.

12 THE COURT: Sure. Great.

13 MR. BURCK: So one other point on this slide, your
14 Honor, there is no -- and this is very different from
15 *Harrington*, just as a point. There is no explanation of how
16 these seven defendants coordinated to go after this same very
17 low-profile stock, exact same scheme, exact same stock, exact
18 same time period. There's no allegation they coordinated. So
19 apparently they all independently came up with the idea that at
20 the exact same time with this particular stock, here's what
21 we're going to do; we're going to spoof it. And again, it's
22 very important that the plaintiff says that in the context of
23 not even alleging what the price was before these spoofing
24 incidents. So we don't even know where the price was before
25 and what the effect, the price effect was.

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1 So again, this is a truly miraculous conspiracy, where
2 seven independent competitors -- again, they're not even
3 alleging there was coordination, your Honor -- decide to attack
4 the same stock in the same way, and we have no idea what the
5 price effect was. And oh, by the way the stock doubled in
6 price during this period.

7 Next slide, please.

8 Now, your Honor, this goes to something we were
9 talking about earlier, but this is a key point to understand,
10 and I think this is a distinction of sorts within the
11 *Harrington* framework. NWBO acknowledges defendants are
12 broker-dealers that traded for their clients. The defendants,
13 as I just explained, could not obtain any additional profits
14 from this spoofing on behalf of their clients. In fact,
15 they're indifferent between you're buying or selling, and they
16 don't allege anything different. And again, there's no
17 allegation they conspired with their clients. Again, we'll
18 look at *Harrington* to understand what exactly was alleged.

19 THE COURT: Just to be clear, they don't concede, as I
20 take it, the *Harrington* plaintiffs conceded after discovery,
21 that trading was conducted solely for clients.

22 MR. BURCK: No.

23 THE COURT: As I understand, the complaint here
24 alleges that it was done either for the defendants' own
25 accounts or on behalf of clients or both.

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1 MR. BURCK: Yes, your Honor. They do, and they don't
2 explain which is which or why.

3 THE COURT: At this stage of the litigation.

4 MR. BURCK: Well, your Honor, we'll get to that.
5 We'll get to the proprietary trading in a minute, but I think
6 the proprietary trading is actually even more damaging to their
7 intent theory, the scienter, than the client trading.

8 We can go to the next slide, because we've already
9 covered this issue with the judge.

10 And again, your Honor, this is just the fact that
11 there's no greater commissions, etc.

12 We can go to the next slide.

13 Judge, now, to your question about proprietary
14 trading, so here's what we did, Judge, in order to figure out
15 what they mean by proprietary trading and what the motive could
16 have been to these market makers to do the spoofing on their
17 own behalf.

18 So here's what we did, your Honor. We took the public
19 data. We took the allegations of the complaint. We took the
20 executing price from the public data. We took the best offer
21 price from the public data, and we multiplied that by the
22 difference in the volume of them executing purchase. In other
23 words, we just took the numbers that were in the public data
24 based on when they said the spoofing occurred, and we
25 multiplied out what the difference was over the entire period.

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1 So if every single trade, your Honor, every single trade that
2 they allege was part of the spoofing scheme, the difference
3 would have been \$94,458.68 total.

4 THE COURT: OK. Let me just see if I can unpack this.

5 First of all, the \$94,000 figure is not what you
6 contend is the profits from the 11 or 16 example episodes
7 featured in the complaint. It's the totality of the hundreds
8 or thousands; I forget which.

9 MR. BURCK: From what we can discern from the
10 complaint, your Honor, yes.

11 THE COURT: OK. And then secondly, in making that
12 calculation, did you rely on any documents or exhibits other
13 than the complaint itself and the exhibits to the complaint?
14 In other words, did you rely on any of the publicly available
15 data that you contend is properly before the Court on a motion
16 to dismiss?

17 MR. BURCK: Yes, your Honor, we did. And in fact, we
18 used the same data that the complaint says it relied on. So we
19 used the OTC Link data, which the complaint actually
20 specifically references, that's publicly available, which the
21 plaintiffs do say that they contest it without explaining why
22 or how they contest it. But they actually reference it
23 themselves in the complaint.

24 THE COURT: And is that data part of your exhibits,
25 the defendants' exhibits?

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1 MR. BURCK: Your Honor, one of my colleagues just
2 reminded me, this is actually all from the complaint and the
3 exhibit. This is entirely from the complaint and the exhibit.

4 THE COURT: OK. Thank your colleague.

5 MR. BURCK: And again, they reference this specific
6 public data that we then used as well to do the measurement.
7 In other words, this number's not in their complaint,
8 obviously, but we used the information that's in the complaint
9 and the exhibit.

10 THE COURT: OK. Give me one second. This is a
11 question for either you or your colleague, but to ascertain
12 what the defendants sold the shares purchased in the executing
13 purchases at, the price for that, is that the column at the far
14 right of exhibit 1 to the complaint, next sale by defendant?

15 MR. BURCK: I believe it is, your Honor, just on my
16 memory. I have it in my mind, your Honor, but I want to make
17 sure I can --

18 Your Honor, I have it in front of me now. I'm sorry.
19 The question, your Honor, the best offer --

20 THE COURT: Yes, the question, in identifying -- so
21 the allegation is that there were executing purchases, I think,
22 is the terminology in the complaint, where the defendant bought
23 at the allegedly artificially depressed price, and then you're
24 saying you calculated the profits as alleged in the complaint
25 from those purchases. And then the question is what did you

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1 use in figuring out what those shares were sold for?

2 MR. BURCK: Your Honor, if you look at the -- if you
3 have the exhibit in front of you, we used the best offer, which
4 is the top column, and then we looked at the price, the
5 executing purchase, under price. Then we multiplied it by the
6 volume, which is under the baiting orders.

7 THE COURT: Why would you use the best offer as
8 opposed to the next sale by defendant? The offer isn't a sale
9 at all. It's just an offer.

10 MR. BURCK: Your Honor, the allegation in the
11 complaint is that it's the best that -- the proper, the baiting
12 issue is the best offer minus what the actual baiting offer
13 was. That's the allegation in the complaint. So we're using
14 what they've said is the basis.

15 THE COURT: It seems like apples and oranges. We're
16 trying to calculate how much money they made on the executing
17 purchases.

18 MR. BURCK: Well, your Honor, they're saying that the
19 way to calculate that is the best offer, so we used the best
20 offer price and then used the executing price.

21 THE COURT: OK. You're saying you used their numbers.

22 MR. BURCK: Right. We used what they alleged. And
23 then if you do the calculation -- of course, plaintiff is
24 welcome to check our work -- it ends up at \$94,458 over the
25 entire period. That's about \$3,000 per market maker.

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1 So, your Honor, we would submit that a \$94,000 profit
2 divided by seven different defendants is probably not going to
3 immediate the PSLRA's exacting standards for saying they had a
4 motive to do this.

5 Go to the next slide. Thank you.

6 Your Honor, without motive -- and we're going to talk
7 a little bit about the circumstantial allegations -- the
8 circumstantial evidence has to be much, much more significant.
9 That's black letter law in the Second Circuit. The spoofing
10 allegations here, we submit, are indistinguishable from routine
11 market activity. We'll go into that on the next slide. And it
12 also relies on incomplete trading data, because the public data
13 set, which, again, they reference in their complaint -- they
14 don't use it, but they reference it in their complaint, and
15 again, we believe the Court can take judicial notice of what's
16 public information, refutes what they say.

17 Go to the next slide.

18 Your Honor, here we have the purported spoofing
19 indicia. We have on one side the conclusory indicia of
20 spoofing that the plaintiff alleges and then we have on the
21 other side what they actually allege based on what they say in
22 the complaint. So the indicia of spoofing that the plaintiff
23 admits is required for spoofing is that you cancel all the
24 baiting orders. But their complaint, they admit that while
25 they may not have canceled, they may have or may not have

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1 canceled, and they never, ever, a single time identify a single
2 moment that anybody canceled an order.

3 The defendants did not sell any shares during the
4 baiting periods. That's another element of the spoofing. They
5 admit that, well, they may or may not have sold shares, which
6 again is completely consistent with spoofing.

7 The defendants parked orders away from the market.
8 Well, we're going to show in a minute that the defendants'
9 prices were quite competitive, actually often much better, and
10 the defendants' orders were not, in fact, behind anything.

11 And then finally of course, there's the price
12 depression issue. There was no price depression here.

13 Go to the next slide.

14 So I'll start with the cancellations. Go to the next
15 slide.

16 Something very important to understand about the OTC
17 Link market, your Honor, is that, and this is in our briefing,
18 you can only show one bid at a time. So the idea that you can
19 flood the market with a bunch of different bids and then pull
20 them all down is actually not how it works.

21 THE COURT: I do have a question about that.
22 Accepting for the moment, and I may hear something on the
23 contrary from Ms. Posner, that you can only display one bidder
24 offer at a time, how does that negate the possibility that
25 there were multiple baiting orders flashed on the screen

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1 sequentially over time, maybe only one stays on the screen at
2 any one time, such that the one placed at 1 o'clock only stays
3 on the screen until 1 o'clock and three seconds, when the next
4 one comes up. But nevertheless, the market is still seeing
5 multiple offers and presumably taking that into account. Why
6 would that indicate as spoofing?

7 MR. BURCK: Well, your Honor, the way a typical
8 spoofing scheme works is that there are actually multiple
9 offers going out at the same time. In other words, it's not a
10 one bid, one bid.

11 THE COURT: No, but they're claiming -- in other
12 words, you're not disputing what I'm saying.

13 MR. BURCK: No, not at all.

14 THE COURT: That that's possible, that a spoofer on
15 this OTC Link market could, a real spoofer -- I know you say
16 your clients are not real spoofers -- could spoof the market
17 through a flood of presumably incrementally decreasing offers
18 to give the impression of softness in the market and a lot of
19 sell side demand.

20 MR. BURCK: They could theoretically do that, your
21 Honor, but again, the reality of the OTC, what is actually
22 alleged here is that there were these multiple bids and then
23 you pull out a bid, it's canceled. That's what they're
24 alleging, your Honor. They're saying that once you see a bid
25 disappear, it's been canceled. That's not how it works in the

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1 OTC Link market. In other words, when you see a bid disappear,
2 it doesn't mean it was canceled. It just means that there's a
3 new bid.

4 THE COURT: I understand that. They're all canceled
5 later after the executing purchase. That's what they allege.

6 MR. BURCK: Well, that's what they allege, but again,
7 Judge, we'll go into some of the public data set, also what
8 they said in the complaint, that contradicts that. But the
9 fact is what they're saying, on its face, that somehow the fact
10 that a bid disappears, they say that's the cancellation, your
11 Honor.

12 THE COURT: I don't think they say that that's the
13 cancellation.

14 MR. BURCK: Your Honor, I think they do allege that,
15 that effectively it's the cancellation. They say other things
16 too, your Honor, but the idea that because it disappears,
17 they're canceling the bid, somebody puts up a bid or an ask
18 really, your Honor, and then the ask goes away, that therefore
19 they've canceled the ask. That's not how the OTC Link market
20 works. They're making an assumption that is actually not the
21 way the market works.

22 So, and as we say in the slide, an order can actually
23 be retained and redisplayed later on. So when the market maker
24 takes the, or a new ask price comes up and the old ask price
25 hasn't disappeared, hasn't gone away or been canceled, it could

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1 also come back, depending on how the market's moving. That,
2 again, is very distinct from what they're alleging. And that's
3 not actually how the OTC market works.

4 And again, your Honor, very important, we think, is
5 that the NWBO doesn't identify a single time, a single specific
6 order that was canceled. Again, they want the Court to assume
7 that because a link, an ask price comes down that it's been
8 canceled, but that's not a cancellation, because it still could
9 come back up. And they're not canceling an order in any sense
10 of the word. And again, that's why they're trying to say --
11 that's how they're trying to create this impression that there
12 are all these cancellations going on, but they don't actually
13 allege any specific cancellation. And without a cancellation,
14 you can't have spoofing.

15 THE COURT: They very specifically allege in the
16 example episodes that beginning at a certain moment in time the
17 baiting orders were canceled.

18 MR. BURCK: Yes, and we can go into that, your Honor.
19 We're going to go into those specific examples in hopefully not
20 nauseating detail but some detail.

21 THE COURT: But that time period begins after, as
22 alleged, the executing purchase, I think, really determinative
23 what the executing purchase, so that seems to me to refute your
24 notion that they allege that baiting orders were canceled
25 before the executing purchases.

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1 MR. BURCK: Well, your Honor, I don't think it's clear
2 at all what they're alleging. They say both things. They
3 actually say in their complaint --

4 THE COURT: They allege cancellations in very, very
5 high percentages vis-à-vis the other participants in the
6 market. It seems like at this stage, on the motion to dismiss,
7 that that is something I need to accept as true.

8 MR. BURCK: Your Honor, again, they allege in general
9 that they canceled and they can't point to a single
10 cancellation in the entire complaint. So I don't think that's
11 what the PSLRA is talking about, that a plaintiff can simply
12 say, well, we meet the standard because we say this is what
13 they did.

14 THE COURT: They allege baiting orders were placed
15 from such and such time to such and such time and then the
16 orders were canceled after that time.

17 MR. BURCK: Your Honor, again --

18 THE COURT: Isn't that what they have to allege, that
19 orders were canceled?

20 MR. BURCK: Your Honor, it's not actually backed by
21 what they actually say and what they cite in their complaint.

22 THE COURT: They don't have to cite evidence in their
23 complaint.

24 MR. BURCK: They don't have to cite evidence, but they
25 have to actually have some basis to say what they said. We're

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1 in the PSLRA land here. We're in heightened and exact pleading
2 standards, so they can't simply say these are baiting orders,
3 your Honor.

4 THE COURT: They allege a specific number of shares,
5 30,263, and then allege that those orders were canceled.

6 MR. BURCK: Your Honor, true, but on the public data
7 set and also what they cite in their complaint, we're going to
8 show that that didn't happen. That actually did not happen, on
9 the face of the complaint. And Judge, even if you think that
10 there's some enough evidence of baiting orders or cancellations
11 just based on the mere fact of an allegation, Judge, we don't
12 even know because they've removed from the complaint the price
13 effect. We don't know the price that they're talking about.

14 So if.

15 THE COURT: That's a different point.

16 MR. BURCK: It's a different point, but it goes to the
17 fact that if they allege, OK, baiting orders, cancellations,
18 etc., that without the actual full, the key data that's part of
19 that scheme being alleged, the whole thing collapses.

20 And your Honor, the other thing that's very, very
21 important, and I mentioned this several times, because I think
22 this is, again, very important. We're talking about two
23 minutes, your Honor. They're alleging spoofing occurs in two
24 minutes from the bait to the execution. There's no case --
25 *Harrington, Keshev Tov* -- that has anything to do with minutes.

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1 We're talking about milliseconds.

2 THE COURT: Are you referring to the cancellation of
3 the baiting orders or something else?

4 MR. BURCK: The executing purchase, your Honor.

5 THE COURT: No. I understand the milliseconds
6 mentioned in the case law to refer to when the orders were
7 canceled in relation to the executing purchases.

8 MR. BURCK: Your Honor, yes, they do talk, and what
9 we're talking about is that the milliseconds -- we're talking
10 about a two-minute scheme that they're alleging, two minutes
11 between the beginning and the end of the spoof, effectively.

12 THE COURT: But in fact, they do allege that the
13 trades were canceled in at least one specific incident
14 beginning in milliseconds and in most of the other example
15 episodes within less than five seconds. So it's not true when
16 you say that they allege that the orders, it took two minutes
17 to cancel, when you say they don't allege cancellations
18 happened within seconds or even at least in one instance
19 milliseconds.

20 MR. BURCK: But, your Honor, the spoof has to include
21 the executing order. In other words, if somebody has a baiting
22 order and then they -- or an order, call it an order, and then
23 they cancel it within milliseconds, that's not spoofing.
24 Happens all the time. The whole scheme has to include the
25 final --

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1 (Indiscernible overlap)

2 MR. BURCK: Exactly.

3 THE COURT: Correct. And I know you said in your
4 letter they allege that defendants placed and then canceled the
5 baiting orders within one or two minutes, but as I understand
6 the complaint, they allege that the cancellations occurred
7 within seconds in most instances and in one instance within
8 milliseconds.

9 MR. BURCK: Your Honor, again, I don't take issue with
10 that. The point, though, is that saying the cancellations
11 occur within milliseconds has nothing to do with the actual
12 question of whether or not the spoofing occurs. Because in the
13 other cases you're talking about everything happening,
14 including the executing purchase, happening within
15 milliseconds. So everything happens within milliseconds.
16 This, the final part of the scheme, the most important part,
17 which is making the money off the executing purchases, doesn't
18 happen for two minutes.

19 Your Honor, I'm not speaking because I see you're
20 writing notes.

21 THE COURT: No. Go ahead. Thank you.

22 MR. BURCK: All right. Let's go to the next slide.

23 So, your Honor, we don't have to belabor this point,
24 but this is what we were talking about, the fact that they can
25 only display one order at a time. I think the Court gets our

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1 point on that.

2 We can go to the next slide.

3 Your Honor, on the question of did the defendants sell
4 any shares during baiting periods, now, of course, the key of
5 the spoof is that you don't sell the shares during the baiting
6 period because the whole intent is to have a fake sale price
7 that you then have people come into the market to try to sell.

8 In this case, your Honor, the defendants did sell
9 shares during the periods.

10 Go to the next slide.

11 Now, your Honor, we spoke to plaintiff's counsel after
12 the first complaint because we pointed out that we, in fact --

13 THE COURT: I understand the background. I'm a little
14 nervous about time.

15 MR. BURCK: Understood, your Honor.

16 We can move to the next slide.

17 THE COURT: Well, but on the subject of sales during
18 the spoofing period, how many times do you claim that happened?

19 MR. BURCK: Your Honor --

20 THE COURT: You don't claim that happened every time,
21 do you?

22 MR. BURCK: Right. No, we don't claim it happened
23 every time. We're also not trying to offer up here's how many
24 times they sold. We just told them that there were actual
25 sales in that period, and they amended the complaint

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1 accordingly. So we're not saying --

2 THE COURT: As I understand their amendments, they
3 said for each of the example episodes, we don't see any sales,
4 but even if there were sales, that wouldn't defeat our theory.

5 MR. BURCK: Right.

6 THE COURT: But they're not conceding there were
7 sales.

8 MR. BURCK: They're not -- well, they may not be
9 conceding there weren't sales, but I think the reason why
10 they're not affirmatively alleging that there were no sales,
11 which is a key part of spoofing --

12 THE COURT: No. But they are. They allege that as
13 far as we can tell there were no sales, unless I have that
14 wrong.

15 MR. BURCK: No. They actually said in their
16 complaint, your Honor, at some point that they may or may not
17 have sold. Maybe that's a similar point you're making, but I
18 think it's a different --

19 THE COURT: I understood it to be as far as we know
20 there are no sales, but even if there were, that wouldn't
21 matter. That's not a concession that there were sales.

22 MR. BURCK: Well, it's not a concession there were
23 sales, but your Honor, if they allege that there may have been
24 sales, it can't be spoofing. You can't spoof and sell a
25 baiting order. There's no such thing.

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1 THE COURT: I don't know why I'm not supposed to draw
2 the inference at this stage that their first allegation that
3 there were no sales is incorrect. That's what they're saying.

4 MR. BURCK: Well, that's what they said in their first
5 complaint. And then when they amended, they changed that.

6 THE COURT: They acknowledge that there may have been
7 sales, and I suppose if I drew inferences in your favor, I
8 would conclude as you suggest, but that seems to flip the usual
9 rule.

10 MR. BURCK: Your Honor, just one thing on that point.
11 We're not obviously asking you to draw inferences in our favor,
12 but the PSLRA does require the courts to consider that if
13 something is equally plausible between what the plaintiff says
14 and what the defendant says, then the tie doesn't go to the
15 runner.

16 THE COURT: With respect to scienter.

17 MR. BURCK: With respect to scienter.

18 THE COURT: Also, in *Harrington*, it seemed to me that
19 there was similarly an allegation or a concession -- again,
20 they had discovery in that case, so I guess they knew more
21 facts -- that sometimes there were sales during the spoofing
22 period, but that didn't seem to dissuade Judge Schofield from
23 upholding the complaint.

24 MR. BURCK: Your Honor, again, we don't think -- we're
25 not here on *Harrington*. Obviously, we don't think *Harrington*

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1 was necessarily rightly decided, but we also think that it's so
2 dramatically different, the facts that are alleged there, than
3 what's alleged here, that there are all kinds of other reasons
4 why the judge would have reached the decision that he did. So
5 this is -- and we'll get into *Harrington*. Again, I'm conscious
6 of time, your Honor. So I'll try to speed it up.

7 THE COURT: There would be enough time for you, but
8 unfortunately --

9 (Indiscernible overlap)

10 MR. BURCK: Well, maybe I'll just run out the clock.

11 I get it, your Honor. Let me move on to, unless you
12 have any other questions about this, your Honor, to the
13 competitive price, the parked orders. I think this is an
14 important issue, your Honor.

15 Now, the allegation, of course, in spoofing is that
16 you park orders away from the market. Right?

17 And we can go to the next slide.

18 The idea of parking, of course, is that you're placing
19 those orders away from the market so it makes it highly
20 unlikely that anybody will actually try to buy it. Right?
21 Because the point of the spoofer is not to actually sell the
22 stock. Right? And they don't want to sell it at what is now
23 an inflated price.

24 Now, in the complaint, your Honor, the plaintiff
25 alleges exactly one other market participant behind whom we

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1 spoofed, the defendants spoofed. And there's one time that
2 they allege it. And that's not a market-wide phenomenon.
3 That's one particular incident, and we'll talk about that
4 incident in a minute.

5 Now, on this chart here, your Honor, the unsuspecting
6 market participant's lowest price -- that's the green -- was
7 \$2.24. The parked baiting order price range -- this is what
8 they allege in their complaint, your Honor -- was 2.19 to 2.25.

9 So as you can see, everything below that green line is a
10 better price than the 2.24. Again, your Honor, this is taken
11 from their complaint and from the public data. So this would
12 be the most backwards spoofing incident and parking of all
13 time, since they didn't park all that space below the green
14 line.

15 Next slide.

16 Now, and this is important to the point the Court
17 raised before about use of, what the complaint says and the
18 public data. They say in their complaint, your Honor, that
19 they used historical data provided directly by OTC Markets
20 Group to support their allegations. And the defendants
21 provided the Court with the very same publicly available data
22 from the OTC Markets Group. And NWBO hasn't disputed that this
23 is the same data, and at every turn the data refutes what they
24 are alleging in their complaint. Again, this is what they say
25 they used for their complaint.

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1 Next slide.

2 So, your Honor, this is the parking example again.

3 This is one directly about Citadel and Ascendant Capital
4 Markets. This is an allegation that Citadel Securities parked
5 behind Ascendant. And we took the exact time, your Honor,
6 that they allege, the time period they allege for the baiting,
7 and we looked at what actually happened. And so it's a little
8 bit of a busy slide, but if you look at the right-hand side,
9 Citadel Securities offers, and you look at the red offers on
10 the left side, which are Ascendant's offers -- excuse me,
11 asks, to be precise -- you will see that in every instance,
12 Citadel's price was better than Ascendant's -- before, after,
13 during, in every single instance. And this is what they allege
14 specifically in their complaint, your Honor, is an example of
15 our spoofing and parking behind Ascendant.

16 Next slide.

17 Your Honor, we're taking here six examples, and our
18 brief goes through all the examples, but we're taking six
19 examples here of the same phenomenon, your Honor, the parking.
20 The market range price is the green price. That's the price
21 that the market is moving in the exact period that the
22 plaintiff is alleging the spoofing is occurring, and we're
23 looking at what the parked baiting order price range was at the
24 time from the seven defendants.

25 Your Honor, if you look at the fact that almost in

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1 every one of those cases it's either at the bottom of the
2 market price range or toward the middle in one instance. None
3 of that is consistent with spoofing. It's the exact opposite
4 of spoofing. It's the exact opposite of parking. You can't
5 park something behind a worse price.

6 Next slide.

7 Now, your Honor -- actually, sorry. Next slide.

8 Just on this parking, just a little bit more, your
9 Honor. NWBO alleges that orders are parked even if they were
10 the best order when placed. Citadel Securities parked these
11 baiting orders behind orders placed by other unsuspecting
12 traders; parking its baiting orders behind orders by other
13 market participants, further evidence that defendant was not
14 engaging in legitimate market activity.

15 The key point here, your Honor, again, from the public
16 data, is that Citadel, in this instance, was actually offering
17 the best price and that somehow is the baiting order and it's
18 being parked behind something that does not exist and is not
19 even alleged.

20 Go to the next slide.

21 Your Honor, this is -- hopefully I can move through
22 this relatively quickly, because I don't think there's really
23 any dispute on this point.

24 The defendants say they purchased shares at depressed
25 prices. Well, of course, the shares were not depressed at any

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1 point during this entire scheme, this alleged scheme. Five
2 years.

3 THE COURT: Well, Let's distinguish between the
4 long-term alleged price depression over the five-year period
5 and the much, much, much, much shorter term alleged price
6 depression connected to the specific spoofing incidents.

7 MR. BURCK: Well, your Honor --

8 THE COURT: And I understand you have an argument
9 that, at least in some instances, you say based on the publicly
10 available data, you're asking me to consider the price actually
11 went up.

12 MR. BURCK: Well, your Honor, the price not only went
13 up through the entire period, but also they bought -- they
14 conceded this -- they bought at the closing price.

15 THE COURT: I'm not even focused on the loss issue.

16 MR. BURCK: Understood, your Honor, but the point is
17 that you can't -- beyond the loss causation, your Honor, if you
18 buy at the closing price, you're defeating the idea that
19 there's a spoofing effect, because the closing price happens
20 after, and in all these instances, long after the spoofing is
21 alleged to have occurred.

22 Remember, spoofing is supposed to -- eventually, the
23 price is supposed to go back to where it's meant to be. The
24 whole idea of spoofing is that it's an artificial price and the
25 market will figure it out. So it's not just a loss causation

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1 issue, your Honor. It's also the timing of when they bought it
2 is not during a spoofing incident. In *Harrington*, the idea was
3 that there was a fund that had clients and they were buying
4 stock, they said, during the actual spoofing. Their allegation
5 is that they bought the stock after the spoofing had occurred
6 and it had some long-term effect -- and that's their words --
7 on the stock price and that every time they bought at the
8 close, which they had to because they're a publicly traded
9 company, that they then suffer from the spoofing. So it's not
10 just a loss causation issue, your Honor. It's an actual
11 substantive question about whether or not spoofing occurred and
12 whether or not they suffered from any spoofing.

13 THE COURT: Yes, but I thought we were talking about,
14 from the defendant's perspective -- forget about whether the
15 plaintiffs purchased or didn't purchase -- you contend that one
16 of the reasons why their allegations of spoofing are flawed is
17 the whole theory is that they supposedly weren't trying to
18 drive the price downwards, but instead the price went up.
19 Correct?

20 MR. BURCK: Correct.

21 THE COURT: OK. And you rely on this publicly
22 available data to show that, and I want to get back to that in
23 a moment. But even assuming I could consider that data, as I
24 understand it, and please tell me if I have this wrong, your
25 data is just quotes. It's bids and asks. It's actually not

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1 transaction data. It doesn't show prices. Is that right?

2 MR. BURCK: Well, your Honor, it's data that we took
3 from the OTC Markets Group.

4 THE COURT: I didn't ask you where you got it from.

5 MR. BURCK: No. That -- I just want to make sure that
6 I speak to my colleague. It shows the best prices, your Honor.

7 THE COURT: But it doesn't show actual trades, at
8 actual prices.

9 MR. BURCK: It does not, your Honor.

10 THE COURT: OK. And at least in one instance, in
11 footnote 60 of their brief, the plaintiff, relying on actual,
12 as I understand it, transaction data, says, well, actually, the
13 defendants have this wrong. The price did go down shortly
14 before the -- I think it was Citadel's, but whichever defendant
15 was involved, before their purchase. And I didn't see anything
16 in your reply brief about that.

17 MR. BURCK: Well, your Honor, I think that -- well, I
18 know the footnote you're referring to. We're not sure exactly
19 what they're talking about, but also --

20 THE COURT: True, they didn't have a cite, but
21 nevertheless, they're at least talking about prices and
22 transactions, and you're not.

23 MR. BURCK: Your Honor, with respect, we are talking
24 about best prices that are provided. The best price is a key
25 issue for purposes of determining the baiting issue.

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1 THE COURT: It sounds to me like there's a dispute
2 over the interpretation of the data and what it means.

3 MR. BURCK: Well, your Honor, actually, that's a good
4 segue to this slide, because -- let's take one of their
5 examples, your Honor. OK? October 12, 2020. In the original
6 complaint --

7 THE COURT: Speak of the devil.

8 MR. BURCK: Right.

9 In the original complaint, they said that they had a
10 spoofing start date, price was 1.02, 1.04. Right? The
11 executing price is 1.02. That makes sense from a spoofing
12 perspective. Right? You have a higher price than the
13 executing purchase price. We showed them that, in fact, the
14 price was .995 to 1, the actual price, and that the executing
15 price is 1.02, so that was the opposite of spoofing.

16 So in their amended complaint, Judge, what they did is
17 they took out the price that starts at the spoofing start
18 period. They took it out. It's not alleged, and they simply
19 say the executing price is 1.02. That's what they allege, and
20 that's what they allege throughout. Again, this cannot meet
21 the Second Circuit's standard of showing a price effect of some
22 sort because we don't know what the price effect is because
23 they don't allege it, which goes back to the point that when
24 you look at the data, both in their complaint and the public
25 data, we know that the price doubled and they're not alleging

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1 that there was even any specific price effect with respect to
2 the spoofing incidents that they identify. And that's in their
3 complaint, your Honor. That's not public data. They just
4 didn't put it in there. And we don't think that even comes
5 close to meeting what the standard is the PSLRA requires for
6 plaintiff.

7 Next slide.

8 So, your Honor, this is -- again, I'm conscious of
9 time, so I'm going to try to get through some of this
10 relatively quickly.

11 THE COURT: Yes. I think I can only give you, like,
12 another five minutes.

13 MR. BURCK: OK, your Honor. You know what I'm going
14 to do? I'm going to go to a couple of, skip a couple points.
15 This is all in our briefing so we can skip this slide.

16 One thing I wanted to talk about, your Honor, is this
17 price decline formula that the plaintiff has. They have it set
18 out in their complaint, in their brief. And just in a
19 nutshell, your Honor, the math is very simple. Every single
20 time, because they put X as the smaller number, Y as the larger
21 number, minus one, in every single case you have to have a
22 negative result or a zero result. So their very formula, which
23 they're relying on to show that there was some impact, creates
24 a constant negative number.

25 THE COURT: Here's the main question I have about

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1 that, and they don't say this exactly, and I'll have the same
2 question for Ms. Posner, but what they did say sort of led me
3 to believe that what they are saying is that under their
4 formula, if the price went up rather than down, you'd get a
5 zero. You wouldn't get a positive number, but you'd get a
6 zero -- and again, I'm showing -- they didn't say this in so
7 many words -- that I assume what they may be saying is, you
8 know, if this were sort of random, you'd have 50 percent zeroes
9 and 50 percent of the time it would be a negative number, but
10 in fact, under our calculation, it was negative each and every
11 time. Do I have that wrong? And if I don't have that wrong,
12 isn't that indeed some indicia at least at the pleading stage
13 that the price, in fact, declined?

14 MR. BURCK: Your Honor, if we just look at the
15 example, so we're taking their formula, the price went from 1
16 to 2, minus 1, it went down 50 percent. That's their formula.
17 So we're using the exact example that you just mentioned.
18 Their price went from 1 to 2, and you subtract 1, that's 50
19 percent.

20 THE COURT: OK. We'll hear from Ms. Posner on that.

21 MR. BURCK: Next slide.

22 Your Honor, this is -- again, I'm going to be quick on
23 this, but I just think this is important.

24 Next slide. I'm sorry.

25 So we took all of the actual examples of the purported

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1 spoofing, and again, NWBO alleged that it sold shares at the
2 closing price, certain pricing dates, so we looked at when they
3 said they purchased. And this is the 16 examples they actually
4 cite. None of the 16 spoofing examples occurred anywhere near
5 the closing price or pricing date. This is important, your
6 Honor. This is, again, the point we were making earlier. And
7 some were months after the alleged spoofing episode. There's
8 one, your Honor, and this is the 16 examples they have.
9 There's one that happened six hours after the spoofing
10 incident; the closing was six hours after the spoofing
11 incident. That's one time. There's one that's 24 hours.
12 There are three that were one to two weeks. There are three
13 that are two to four weeks, and there are two that are four to
14 six months, your Honor. And then the others, they just don't
15 have any subsequent pricing date, so we don't know when it
16 happened. So -- and the ones we identify, your Honor, the best
17 they have is six hours. And again, I don't want to reopen the
18 debate about the timing, your Honor, but the idea that there's
19 no case of spoofing that's ever seen anything like a six-hour
20 gap, much less 24, one, two weeks, two to four weeks, unless
21 they're alleging a long-term effect, your Honor, which, of
22 course, they do allege but they don't explain what that means,
23 and of course, the long-term effect on its face is that the
24 price doubles.

25 All right, your Honor, the last issue, and then I will

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1 hand over the mike, is really on the reliance issue. And I
2 won't spend a lot of time on that, your Honor, because I'm sure
3 you've read the cases. But the core point is that the OTC
4 market, no court has actually said that the OTC market on its
5 own is an efficient market. In fact, many have said that it is
6 not.

7 THE COURT: What about Judge Underhill in *In re Teva*
8 *Sec. Litig.*?

9 MR. BURCK: Your Honor, I believe that's a case where
10 it was OTC and an exchange, like NASDAQ, or the like, and the
11 issues have not been engaged about whether or not the OTC
12 market has to be -- and there's also a case, your Honor, in
13 which the security itself is determined, specifically based on
14 the information about that security that is in the case, is
15 determined to be efficient, but the market itself is not
16 determined to be efficient. It's the security trading on that
17 market. I'm not sure if that was that specific case, but those
18 are the examples that we've seen.

19 THE COURT: But the relevant question here is whether
20 the security in question was traded in an efficient market, not
21 whether the OTC market writ large is efficient.

22 MR. BURCK: True, your Honor, although their
23 allegation is that the market writ large is efficient. That's
24 what they say. So we agree with you on both counts, that, A --
25 I shouldn't say I agree with you. I will take your point and

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1 make the point that on the first point, we don't think the OTC
2 market is efficient. We don't think courts have found the OTC
3 market is generally efficient, and we don't think there's any
4 evidence here that the NWBO market is efficient either. And
5 again, their allegation is that the OTC market --

6 THE COURT: There usually isn't evidence at the
7 complaint stage.

8 MR. BURCK: Well, there's no facts alleged, your
9 Honor. How about that? There are no facts alleged that the
10 OTC market is efficient other than to say courts have found
11 this, and all the cases they cite, your Honor, they don't reach
12 the issue or it's the specific -- one case in which there was a
13 specific security.

14 THE COURT: They do allege the *Cammer* factors. The
15 question is whether there's allegations that are too
16 conclusory, particularly given that this is an OTC.

17 MR. BURCK: Correct, your Honor. You anticipated my
18 next slide, which I can probably then skip, your Honor.

19 (Indiscernible overlap)

20 MR. BURCK: I'll save some time.

21 THE COURT: Thank you.

22 MR. BURCK: OK. Thank you.

23 THE COURT: You've been going about an hour and ten
24 minutes.

25 Ms. Posner, your turn.

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1 MR. LAWSON: Your Honor, if I might?

2 I think it might be worth clarifying quickly the
3 benefit point on slide 10. There's some confusion about it.

4 Your Honor, on slide 10 there was some confusion about
5 the benefit point, the \$94,000, and I thought -- it was
6 actually quite an important point. I thought it was worth
7 clarifying before plaintiffs step up so we have a chance to
8 respond.

9 The key point here is, your Honor, that NWBO
10 identifies all the spoofing episodes in exhibit 1 to their
11 complaint. So we have all the examples that they've
12 identified, and they explain in their complaint at paragraph 67
13 that the benefits to the defendant is the difference between
14 the executing purchase price and the prevailing best offer
15 before it. And that's the benefit because they're saying
16 without the spoofing --

17 THE COURT: Where are you reading from?

18 MR. LAWSON: Paragraph 67 --

19 THE COURT: 67?

20 MR. LAWSON: -- of the complaint.

21 "As reflected in exhibit 1, defendants then took
22 advantage of the artificially depressed price of NWBO shares
23 they created by placing executing purchases to purchase a total
24 of 19,300,908 shares below the prevailing best offer prior to
25 entry of the baiting orders, pocketing the difference."

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1 And the idea is we would have had to purchase at the
2 prevailing best offer if it weren't for the spoofing. Instead,
3 we spoofed them. We were able to purchase at the executing
4 price. So your Honor, we can do that math in exhibit 1. We
5 can look at the difference between the executing purchase
6 price.

7 THE COURT: What does paragraph 67 have to do with the
8 prices at which the shares purchased via the executing
9 purchases were sold? I don't see that.

10 MR. LAWSON: Your Honor, the benefit that defendants
11 allegedly obtained is that they were able to purchase prices at
12 the executing purchase prices as opposed to the prevailing best
13 offer price immediately before the executing purchase. That's
14 the benefit that the defendants obtained. Otherwise, they
15 would have had to purchase at the prevailing best offer price.

16 And that's their theory, right on paragraph 67. I
17 believe it's also in their opposition brief. And your Honor,
18 they don't contest that. This was in our opening brief and in
19 our reply brief. So we're able to do that math, and it's in
20 exhibit 1.

21 THE COURT: OK. I have your point.

22 MR. LAWSON: Yes. And your Honor, the key is the
23 total benefit here to Canaccord was approximately \$6,000,
24 according to plaintiff's own --

25 THE COURT: Yes. The same can be said by each and

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1 every one of your colleagues, but I'm not going to let them
2 stand up too.

3 MR. LAWSON: OK. Thank you, your Honor.

4 MS. POSNER: Good morning, your Honor.

5 THE COURT: Good morning.

6 MS. POSNER: So, the complaint here, as I think your
7 Honor recognizes, is not based on information and belief. It's
8 not based on conjecture. It's based on detailed and exhaustive
9 economic analyses of the defendants' own trading data. Those
10 same economic analyses and the indicia of scienter that we
11 plead in the complaint are the exact same economic analyses and
12 indicia of scienter that literally every court that has weighed
13 the evidence with regard to a spoofing case have found
14 indicative of not only manipulative conduct but when there is a
15 scienter component, that there was scienter by the defendants.
16 You see that in all the CFTC cases, the SEC cases, the DOJ
17 cases. In fact, a number of those cases resulted in criminal
18 pleas and verdicts.

19 Defendants ignore virtually all of that case law in
20 their briefing. They didn't cite to a single one of those
21 cases today during the argument. And in addition to those
22 cases, there is a number of cases, including the *Harrington*
23 case, that we referenced earlier today, that address these
24 specific pleading requirements under the PSLRA and the
25 heightened pleading standard in private litigation. And in

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1 every one of those cases, both *Harrington* decisions, the second
2 *Keshev Tov* decision and also *CP Stone*, which is also in the
3 Northern District of Illinois, in all three of those cases they
4 look at the very same economic analyses, these very same
5 indicia of scienter and find that plaintiffs have sufficiently
6 pled market manipulation claim or spoofing claim.

7 In their initial motion to dismiss, the defendants
8 conceded that *Harrington*, *Keshev Tov* and *CP Stone* were on all
9 fours with the fact pattern here; that they are a reason why
10 this Court should dismiss this case. In the case of
11 *Harrington*, they were referring to a discovery order, not the
12 actual motion to dismiss decision. With regard to *CP Stone*,
13 they were referring to the first of three decisions. And in
14 *Keshev Tov*, they just ignored the second decision. But they
15 conceded that the facts alleged in all those cases were nearly
16 identical to our fact pattern alleged here, and that's why they
17 wanted the Court to follow the rulings in those cases.

18 When we brought to your Honor's attention the fact
19 that there were subsequent decisions in that case or different
20 decisions, addressing different aspects of the litigation in
21 those cases, suddenly those cases are wholly different than
22 what we allege in our complaint. I don't think that is
23 credible. And quite frankly, they ignore the facts in most of
24 those cases.

25 Essentially, what the defendants are asking this Court

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1 to do, and I think defense counsel actually said it kind of
2 explicitly here today, is that they want the Court to overrule
3 the decisions that have been made in the spoofing cases,
4 including by Judge Schofield most recently in the *Harrington*
5 matters, and that they just disagree with the findings in those
6 cases, which is all fine and good, but that's generally not how
7 we practice law.

8 And in order to make their arguments, they resort to
9 essentially kind of, you know, the sky will fall rhetoric or
10 point to specific allegations that they claim need to be made
11 in these cases, but they cite to not a single case that
12 supports either proposition. And they also try to claim that
13 somehow their behavior is routine unlawful market-making
14 activity. It certainly may very well be routine for these
15 defendants. I think that's actually quite likely. What is
16 unlikely is that it is lawful, and numerous courts have found
17 it is not. And in fact, contrary to ordinary, lawful market
18 making, defendants clearly injected exponentially large, more
19 sell side pressure in order to flow into the market, creating
20 this essentially ceiling on the stock price of Northwest Bio.

21 They have no defense. They don't even address the
22 overwhelming majority of our arguments dealing with the
23 imbalance in the market making order book that existed for
24 Northwest Bio. And they then tried to argue that what we
25 allege is somehow unbelievable because why would a number of

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1 different entities get together and engage in the same
2 misconduct without any allegations that they conspired together
3 to do so? I think that kind of argument is folly. There are
4 numerous examples in which separate entities or defendants
5 engage in the same misconduct without conspiring together. We
6 see that in kind of the world around us. Right? You can see,
7 like, steroids in baseball or the fact that 7-Elevens are
8 robbed at high numbers across the country. But we also see
9 that in securities fraud cases. Right? We saw that
10 post-financial crisis, all of the *RMBS* cases. We saw the stock
11 option backdating scandal of the early 2000s where companies
12 were engaging in the same kind of stock option backdating. We
13 saw that in the *Enron*, *WorldCom*, *Sunbeam*, *Tyco* cases, where
14 these entities were engaging in improper accounting shenanigans
15 using special purpose vehicles, the same kind of frauds, no
16 allegations that these defendants were conspiring together to
17 engage in this kind of misconduct.

18 So let's turn a little bit to the specific elements
19 here.

20 As your Honor mentioned earlier, obviously the
21 pleading standard with regard to a market manipulation case is
22 different than with regard to a straight misrepresentation or
23 omissions case, and as the courts recognize, that's because
24 some of the information is wholly within defendants' own files
25 that we have no access to. But even putting that aside, I

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1 think we more than sufficiently plead and provide details that
2 indicate an extremely high level of specificity, demonstrating
3 that defendants engaged in misconduct here. We allege in
4 specific detail how imbalanced their order books were.
5 Defendants say nothing about that. We explain that there was a
6 high concentration of large cancellations after a small
7 executing purchase. This is -- and I should have mentioned
8 with regard to the imbalanced order book, *Harrington*, *Kessev*
9 *Tov*, *Skudder*, *Oystacher*, all say these are indicative of market
10 manipulation.

11 With regard to the high concentration of large
12 cancellations after a small executing purchase, multiple courts
13 look to that to see if there's indicia of fraud -- *Harrington*,
14 *Kessev Tov*, *Nowak*, *Flotron*, *Coscia*, all find that that is
15 indicia of market manipulation. Defendants literally say
16 nothing about that.

17 THE COURT: Well, I wouldn't say they say nothing
18 about that. They say, for example, that you haven't alleged
19 any actual cancellations. That seems like --

20 MS. POSNER: So they do dispute what it means to
21 cancel. They don't dispute that the bids went away, I think,
22 is a fair characterization.

23 Also, we allege in specific detail that the share
24 volume of defendants' baiting orders and defendants' executed
25 sell side orders was completely out of whack. They canceled

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1 4,500 sell side shares while executing zero sell side orders,
2 again, another indicia that courts regularly look at --
3 *Skudder, Oystacher*; they say nothing about that. We point out
4 in specific detail that there was a stark contrast between the
5 share volume of each the defendant's executing purchases and
6 each defendant's sell side orders. They executed 2,000 shares
7 in executing purchases while not executing any sell side
8 orders. That was a fact that the court looked at in *Lek*.
9 Defendants say nothing about that here.

10 They do say something about the cancellation speed,
11 which we allege to have been really quick. But I think as your
12 Honor recognized, we do, in fact, allege that the cancellations
13 were within very short periods of time. With regard to the 16
14 examples, they're all either milliseconds or seconds, no more
15 than 30 seconds.

16 THE COURT: I think if I understood this correctly,
17 and I may not have, what Mr. Burck said is that the
18 milliseconds or seconds in your complaint are based off the
19 cancellation vis-à-vis when the executing purchase occurred. I
20 think Mr. Burck said that in what he would probably call
21 classic spoofing scheme, the whole thing, the baiting orders,
22 you know, beginning with the baiting orders up through the
23 cancellation of the orders, happens within milliseconds or
24 seconds typically. Do you allege for any of these that the
25 whole spoofing episode occurred within seconds?

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1 MS. POSNER: Yes. So, two responses to that.

2 THE COURT: OK.

3 MS. POSNER: One is the case law does not suggest that
4 the entire spoofing episode has to be within two minutes. The
5 case law specifically addresses the short time between
6 executing purchase and the cancellation, which is exactly what
7 we allege in the complaint. But to your point specifically,
8 even if it was the entire spoofing scheme, I believe all 16
9 examples that we allege in the complaint are within seconds. I
10 don't think there are any that go up to two minutes, but I have
11 to specifically look at the transaction numbers to get there.
12 But I think regardless of whether true or not, the case law is
13 not talking about, OK, you started placing a bid at time X and
14 finally the spoof is over at time Y and that change has to be
15 milliseconds. In fact, that often would not give sufficient
16 time for the effect of the baiting order to take place.

17 And in this specific instance, we're not talking about
18 situations where there is one baiting order, one executing
19 purchase and then one cancellation. We are talking about
20 thousands at times, often hundreds, of orders flashing in very
21 small periods of time, intending to move the market in very
22 small increments. So the idea that somehow we shouldn't care
23 about the other stuff that's happening in the market, the other
24 transactions that are occurring in the market, doesn't really
25 make any economic sense to me.

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1 THE COURT: What about Mr. Burck's point about the
2 inability on OTC Link to show more or display more than one
3 order at a time?

4 MS. POSNER: I mean that is, of course, true, but I
5 think as your Honor recognized in questioning Mr. Burck, what
6 matters is what the market sees and what the market thinks is
7 happening. Right? They see the orders flashing as they come,
8 which is encouraging the market to move in a specific
9 direction. It's like a head fake. Right? They're trying to
10 say, hey, look over here, look over here, come this way, when
11 in reality they intend to move the other direction as soon as
12 you take a bite. And that's exactly what is at issue here.

13 I think what they actually say in the pleadings -- or,
14 in the briefing is somehow a modification of their order is not
15 a cancellation. I think that's the argument they're making,
16 which specifically only applies to OTC Link, not Global OTC,
17 but putting that to the side, again, what the courts look to
18 and what matters for purposes of spoofing is how the market is
19 reacting to the news. If you modify an order from a hundred
20 shares to two shares, it has the same effect on the market as
21 if you cancel 98 shares. What matters is what the market is
22 experiencing, what the market thinks is happening in this share
23 price and how it's moving. And the courts are very clear about
24 that. They don't suggest that there's something specific that
25 has to occur that indicates something is going to happen in the

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1 future. It's an amalgamation of all of the factors that the
2 market is seeing and how they are affecting those in the market
3 to react to that information.

4 THE COURT: Just while I have this in mind, I think
5 Mr. Burck also said that your position or your allegation is
6 that the baiting order was canceled when it disappeared from
7 the screen.

8 MS. POSNER: Yeah. I don't --

9 THE COURT: Is that correct? Is he correct about
10 that?

11 MS. POSNER: No, and I'm not sure where that came
12 from. I think we're very specific in the complaint down to
13 milliseconds of when orders were placed and canceled and/or
14 modified. We specifically allege in the complaint why a
15 modification is the same thing as a cancellation and why it's
16 used in that manner. We are very specific about the number of
17 shares that each one of those orders -- and again, this is
18 information that's available from the trading records. We're
19 not alleging that it somehow just disappears by happenstance.

20 All right. They then -- OK. Parking. Right? They
21 spent a lot of time today talking about parking. We
22 specifically do allege a number of instances of parking in the
23 complaint. We don't allege, first of all, which they argue in
24 their brief, that parking is required. We never said that. We
25 said that at times they did engage in parking and that parking

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1 can be an indicia of manipulative conduct, and in fact, in
2 these certain circumstances, they engaged in parking. The case
3 law actually is quite clear that you don't have to allege
4 parking in order to successfully plead a market manipulation
5 case. And the same allegations of parking that we allege in
6 our complaint are the same types of allegations of parking that
7 have been sustained by numerous courts, *Harrington, CP Stone,*
8 *Oystacher, Mohan*. And I think one of the important points, at
9 least with regard to both manipulative --

10 THE COURT: Are you saying that accepting the
11 defendants' representations of what they describe as the
12 absence of parking based on the data that they're relying on,
13 that those same allegations of parking were accepted by courts
14 as being parking rather than nonparking?

15 That was a terrible question.

16 MS. POSNER: I understand what you were trying to say.

17 So, I don't think, fairly, any courts have gotten into
18 the level of granularity that we saw in slide, I think, 22 by
19 the defendants with regard to parking. But what I think
20 defendants' presentation missed is that there is no obligation
21 that the parking transaction be the worst offer in the numerous
22 orders that you saw in those charts. Right? It just has to be
23 behind an order. And it doesn't necessarily even have to be
24 placed behind the order at the exact time at which it was
25 placed. You often see a situation where there's, like,

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1 stacking and moving the orders from place to place. As long as
2 they're essentially keeping it behind one or more orders --

3 THE COURT: I saw that argument in your brief, and I
4 found it rather curious, because you're saying that even if at
5 the time the defendants placed their orders, there was nothing
6 for them to park behind, if somebody else comes along and parks
7 their order -- I don't know if it's in front of or behind --
8 the defendants are still guilty of parking for leaving their
9 order in place?

10 MS. POSNER: They, just like every other market
11 participant, are seeing the orders that are placed on the
12 ticket. Right? They see the order flow as it's coming in.
13 Knowing that it's not going to be executed at a specific place
14 but electing to choose to keep it behind that order --

15 THE COURT: Doesn't this all happen in milliseconds?

16 (Indiscernible overlap)

17 MS. POSNER: Yes.

18 THE COURT: How could that be?

19 (Indiscernible overlap)

20 MS. POSNER: No one is making a conscious decision in
21 the sense that no one is sitting there saying place A, B or C.
22 These are algorithmic high-speed trading programs that are
23 designed to operate in this specific manner. If a trade does
24 X -- this is all coded. If a trade does X, we do Y. We either
25 sit, we stay, we move. That is all preprogrammed and part of

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1 the transactions. No one is operating in milliseconds where
2 they're actually pushing buttons. They'd be far behind the
3 ball by the time they actually got to hit the button.

4 THE COURT: I think I saw that in a Star Trek episode.

5 MS. POSNER: Unfortunately, the markets move a lot
6 quicker than they used to.

7 THE COURT: Are you saying that if the defendants'
8 algorithms were legitimate, they would do something -- cancel
9 an order that they placed that was subsequently in a position
10 where it could be deemed to be parked behind another order and
11 that their failure to do that is, in their algorithm, an
12 indicia of an intent to spoof?

13 MS. POSNER: Their failure to move such that the order
14 would actually be executed demonstrates that they had no intent
15 that the order be executed in the first place, which is the
16 whole concept behind parking. Right? You park in order to
17 indicate to the market that you want people to move in a
18 certain way, but you don't actually want anyone to engage with
19 your transaction. You want them to engage with a different
20 transaction so you don't have to execute at that price. So the
21 goal is to avoid actual execution by encouraging -- but still
22 encouraging the market to move in a specific direction.

23 I think one of the other points that I want to make
24 here that is important and, I think, lost a little bit in the
25 briefing, is that no one specific indicia of manipulative

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1 conduct is sufficient or necessary to successfully plead a
2 market manipulation case. What the courts require is that the
3 court look at all of these allegations in total, and where they
4 all seem to be indicating, I don't think there can be any real
5 dispute that the vast bulk of the indicia that we allege in the
6 complaint are all moving in only one direction. They're not
7 refuted by the defendants in any significant way with regard to
8 at least the bulk of them, and all of the indicia that we refer
9 to are the indicia that the courts rely on in making their
10 determinations of whether there's manipulative conduct.

11 So what did defendants say in response to some of
12 these? I think we heard this earlier, that somehow OTC markets
13 are immune from manipulation. That's, of course, not true.
14 There's, in fact, ongoing cases brought in OTC Link for market
15 manipulation by both the SEC and the DOJ. Regulators regularly
16 point out that the OTC Links --

17 THE COURT: They don't have to show reliance.

18 MS. POSNER: Correct, that is true. They do not. But
19 we have *Kessev Tov*, which is dealing with S&P 500 index options
20 market, which is very analogous to the OTC Link market, and no
21 problems showing reliance there. And for purposes of the
22 reliance point, the pleading standard, again, is Rule 8 for
23 purposes of reliance. We allege the specific *Cammer* factors.

24 I've been doing this for 20 years. I don't remember
25 ever having to plead in more detail the specific allegations of

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1 reliance. It's a question for expert testimony post-discovery,
2 and we would be unable, absent an expert report, to put
3 together specific, detailed allegations about the efficiency of
4 this specific OTC market with regard to Northwest Bio. I don't
5 think that's what the law requires. I've seen no case to
6 suggest the contrary. And contrary to what defense counsel
7 represented today here, OTC market cases get over the element
8 of reliance quite frequently. In fact, the *Cammer* case that we
9 all look to for purposes of determining market efficiency was
10 an OTC market case. So the idea that somehow OTC markets can't
11 be efficient is simply incorrect.

12 THE COURT: Well, the best I can tell, there seems to
13 be a split in authority, frankly.

14 MS. POSNER: I think the split of authority deals with
15 specific instances in which that market was not efficient, not
16 the idea that an over-the-counter market cannot be efficient.

17 THE COURT: There are some statements, I think, in
18 some decisions that go further than you're depicting, but what
19 also seems to be maybe common ground is that either there is no
20 presumption or it's less easy to presume market efficiency in
21 an OTC situation, and in light of that, shouldn't you have to
22 allege something more than the *Cammer* factors, you know, the
23 boilerplate factors themselves without any supporting facts?
24 You don't allege any, I don't believe, supporting facts in
25 paragraph 297, or whatever.

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1 MS. POSNER: I actually think we do.

2 (Indiscernible overlap)

3 THE COURT: -- high volume of trading or something to
4 that effect, but why can't you allege --

5 MS. POSNER: We do allege, we also allege the number
6 of analysts that were covering Northwest Bio, I believe.

7 THE COURT: I don't think so, but we can sort that out
8 later. Can you make those allegations?

9 MS. POSNER: Could we? I suppose we could submit some
10 form of expert analysis, which is really what goes to the vast
11 bulk of the *Cammer* factors. These are typically expert reports
12 that analyze these factors. Could we do that at the pleading
13 stage? I suppose we could.

14 THE COURT: I'm not talking about an expert report.
15 I'm talking about facts pled in a complaint to support what are
16 otherwise conclusory allegations, but that's not anything
17 novel. It may be novel in this context. You've already said
18 that, and maybe you're right. Maybe typically all you do is
19 allege the boilerplate *Cammer* factors. My question is should I
20 require more at the pleading stage because this is an OTC case?

21 MS. POSNER: I don't think there's any support in the
22 case law to require it. That being said, could we do more than
23 what we did? I suppose we could engage with an expert to
24 conduct the analyses that are done pursuant to *Cammer* and plead
25 them more specifically in the complaint.

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1 I do want to point out, though, that in paragraph
2 297(a) through (f), we do specifically plead some of these
3 facts. We pled that they filed periodic public reports with
4 the SEC. We pled the high weekly trading volumes. We pled
5 that they filed registration statements with the SEC on Form
6 S-3. We pled that the market promptly responded to information
7 that they disseminated. We also talked about the fact that
8 they have regular dissemination of press releases, other major
9 news wires and analysts covering them, which are the factors
10 that the courts look to and the specific facts that the courts
11 look to in determining whether those --

12 THE COURT: I get back to where I began. You pled the
13 factors, but you haven't pled facts supporting the factors.

14 MS. POSNER: I mean I guess I could cite to the SEC
15 EDGAR link or give the specific trading volumes per week.

16 THE COURT: You don't allege the number of analysts.
17 In fact, I don't think you allege anything about analysts.

18 MS. POSNER: Yeah. We say it was regularly covered
19 throughout the relevant period by the financial news, and we
20 talk about the financial press and communications through other
21 news wires and similar reporting.

22 THE COURT: Thank you for proving my point.

23 MS. POSNER: And to the extent the Court cares, it was
24 covered by three analysts throughout the relevant time period.
25 Again, it's an over-the-counter stock, so the idea that

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1 there's, like, 40 analysts covering it is not likely. And in
2 fact, the courts have discussed with regard to that factor that
3 what really matters is their coverage of the information about
4 this company in the marketplace, reflecting the fact that the
5 markets have changed pretty significantly. No one's waiting
6 around for somebody to hit EDGAR and going on to EDGAR to find
7 it. The question is, is the financial press, are people in the
8 market covering the stock and getting information from it? And
9 I think there can be no question here that that is true. And
10 to the extent the Court wanted us to, we could be more specific
11 in our pleadings in an amended complaint.

12 THE COURT: OK. Thank you.

13 MS. POSNER: All right. In addition to the other,
14 specific arguments that they make in response to our pleadings
15 that I've already addressed, they say that cancellations are
16 normal, which is, of course, true, but not in the specific
17 pattern in which we allege it to be the case.

18 They argue -- with regard to the client issue, I think
19 your Honor is exactly correct. We specifically allege that for
20 most of the defendants, that they were not trading on behalf of
21 clients. This is true with all the defendants but for Lime and
22 Instinet. All of those defendants, as they concede, and is, of
23 course, true, in their briefing, were market makers. Market
24 makers don't trade on behalf of clients. They trade on a
25 principal basis and proprietary accounts. Whether they were

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1 engaging in those transactions because in other platforms or in
2 other places they knew of specific order flow or even customers
3 wanting to do X or Y does not negate the fact that they are
4 trading on their own behalf in their own proprietary accounts.

5 Now, Lime and Instinet, they do trade on behalf of
6 customers. But again, I think your Honor is absolutely
7 correct. Not only have courts held, including in *Harrington*,
8 twice, that the fact that you are trading on behalf of a client
9 somehow exculpates you from liability is simply incorrect.
10 They have obligations in those contexts to ensure that there is
11 not market manipulation happening through their platform. They
12 have to certify that pursuant to FINRA rules. They, in fact,
13 did so during the relevant period here, and to the extent
14 customers were engaging in spoofing and they were having it
15 happen on their platform, they had no idea that it was
16 happening, which I think is highly unlikely, they had an
17 obligation to do so, and their failure to do so is, at best,
18 severely reckless and still sufficient to get over a motion to
19 dismiss. There have been numerous cases that have suggested
20 that, not only *Harrington*, but *Skudder*, and it certainly flows
21 from the same interpretation as the Supreme Court's decision in
22 *Lorenzo* and the Second Circuit's decision in *U.S.*
23 *Environmental*, you are responsible for the actions of your
24 clients or your customers in the case of one of those cases,
25 regardless of whether you are the one doing it on your own

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1 behalf.

2 THE COURT: Could you address the defendants' argument
3 that taking the allegations of the complaint and the exhibits
4 to the complaint at their word, the defendants are only alleged
5 to have profited to the tune of collectively some \$94,000 over
6 a five-year period.

7 MS. POSNER: Yes. We obviously disagree with regard
8 to the amount of profit they have earned. What they are
9 purporting to calculate there is one side. Right? It's how
10 much cheaper they essentially got the shares than they would
11 have got had they purchased at the best offer.

12 What I think your Honor was referencing when you were
13 having your colloquy with defense counsel is that it doesn't
14 reflect the amount they then profited from either those
15 purchases and/or short positions that they otherwise had in the
16 security when they then sold, and in our specific case, we
17 allege sales within a three-day window post the spoofing
18 episode. That three-day window we specifically chose because
19 it's consistent with the Second Circuit's case law with regard
20 to contemporaneous transactions under 20 cap A. The courts in
21 this circuit, rules go up to five days. Generally, kind of two
22 to five days is what they look at, but we picked three days as
23 a kind of fair assessment of that. But I think it is only
24 looking at part of the question. Obviously we don't have to
25 prove motive or financial pecuniary gain in order to be

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1 sufficient under the securities laws, but I think we do, and
2 the specific allegations that we make in our case and, in fact,
3 the almost exact phraseology, is the same phraseology that
4 Judge Schofield found to be sufficient in *Harrington* and has
5 been found to be sufficient in other cases as well.

6 THE COURT: I did say that -- namely, to figure out
7 the profits, you have to look at what they sold the shares
8 for -- but aren't they correct that you can't really look at
9 that as the amount of profit attributable to the spoofing
10 because there may have been other factors, intervening factors
11 that affected the market and therefore the price at which they
12 sold their shares, but that the difference between what they
13 bought for the shares and what the best offer at the time was,
14 which of course, they said is what you allege, is determinative
15 of how much they illicitly profited from the scheme? Isn't
16 that the better measure?

17 MS. POSNER: I don't think it's consistent with the
18 case law. I'm not sure how it is a reflection of what they
19 actually learned as a result of their fraud. I also think it's
20 premature. I think the assessment of how the stock price was
21 impacted by the spoofing doesn't necessarily just look at what
22 the best offer was as compared to what their bid was, because
23 we are alleging that that best offer price was manipulated in a
24 way that is not reflective of true supply and demand and
25 accurate pricing. So to suggest that somehow that delta is an

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1 accurate measure even of what they are purporting to measure, I
2 think, is unfair and insufficient prior to having discovery and
3 expert analysis of the damages here.

4 And I'll just point out what the courts have said on
5 this. In *Harrington*, the court said that the plaintiffs had
6 pled a plausible economic rationale for the alleged misconduct
7 by alleging that defendants "derived economic gain from the
8 spoofing scheme through paid transaction fees for completed
9 customer trades, hundreds of thousands of dollars in saved
10 execution costs for the baiting orders that were canceled and
11 at least millions of dollars in ill-gotten gains."

12 That's specifically what we allege in our complaint.
13 In *Oystacher* --

14 THE COURT: Are you sure there's an allegation that
15 part of the way they benefitted was by saving costs from
16 canceling the baiting orders? That's in your complaint?

17 MS. POSNER: So, we say that the strong motive also
18 existed because they obtained commissions, fees or other forms
19 of compensation for acting on behalf of -- we're specifically
20 here talking about the client trades and that they had a
21 financial incentive to spoof the shares in order to execute
22 client trades at artificially favorable prices and, therefore,
23 gain or retain the trading business of brokerage clients.

24 I think what we're essentially trying to argue and
25 plead in the complaint is that but for them engaging in this

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1 spoofing, the prices at which they purchased would have been
2 different. The prices at which they sold would have been
3 different. Whether they actually had to go through with the
4 transaction or not would have been different. Right? If they
5 were actually trying to get the transaction executed and were
6 not just baiting, they would have paid the execution costs on
7 those transactions.

8 So could we have been more specific? I suppose we can
9 and could be, but I think that's implicitly what we are trying
10 to allege with regard to their motive in this scheme.

11 THE COURT: And what paragraph were you reading from?

12 MS. POSNER: There it is 286 and 287.

13 THE COURT: Thank you.

14 MS. POSNER: And I think the *Oystacher* court actually
15 goes to this point specifically. They say the strategy allowed
16 defendants to buy or sell futures contracts in quantities and
17 at price levels that would not have otherwise been available to
18 them in the market absent their spoofing conduct, which I think
19 is exactly what we do plead here.

20 And we also plead with regard to the Instinet and Lime
21 financial motive as well. We allege, as I just quoted, that
22 they were able to execute client trades and obtain favorable
23 prices for their clients and retain those clients as a result.
24 Again, that's a motive that courts in spoofing cases have found
25 to be sufficient. Both *Harrington* and *Skudder* found that to be

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1 true as well.

2 Would your Honor like me to turn to any specific area?
3 Do you want me to address loss causation or reliance any
4 further?

5 THE COURT: Why don't you address loss causation.

6 MS. POSNER: Sure.

7 As I think your Honor indicated and as is the case in
8 this circuit and as Judge Woods has held, pleading loss
9 causation is under the Rule 8 standard. The types of
10 allegations that we allege in the complaint with regard to loss
11 causation have been sustained by numerous courts in not only
12 spoofing cases but in market manipulation cases more generally.
13 *Harrington, CP Stone, Sharettte*, which is also from the Southern
14 District of New York, *Barclays*, which is also from the Southern
15 District of New York.

16 THE COURT: I think your adversary says those cases
17 involve a much tighter temporal connection between the spoofing
18 and when the plaintiff or plaintiffs are alleged to have made
19 their sales or purchases. Is he right about that?

20 MS. POSNER: He is incorrect about that.

21 So we allege, let's talk specifically about *Gamma*,
22 because I think that's really what they're trying to get to
23 there. So *Gamma* holds that there are two ways you can plead,
24 successfully plead. In the case there it's CEA. It's not
25 securities fraud, but it's analogous enough. They're talking

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1 about damages there versus loss causation, but they say you can
2 plead it in one of two ways. Either the sales happened so
3 close in time to the spoofing episodes that the court may
4 reasonably infer price artificiality affecting the trading, or
5 two, information that shows that the effect of the defendants'
6 spoofing was persistent.

7 We do both in the complaint. We allege, even at the
8 most conservative, that Northwest Bio sold 11 million shares
9 less than an hour after defendants' spoofing. We allege the
10 sale of 2.6 million shares within ten minutes of defendants'
11 spoofing, and in fact, we even allege the sale of 303,000
12 shares within 85 seconds of defendants' spoofing. I think any
13 one of those criteria are more than sufficient to meet the
14 temporal requirement that is at issue in *Gamma*. And not only
15 that, unlike in *Gamma*, where they had no specific allegations
16 with regard to when the transactions took place, we showed that
17 the sales occurred after the spoofing so that they were
18 impacted by the spoofing when made.

19 In addition to those kind of temporal, close temporal
20 connections that we plead in the complaint, we also plead the
21 second way that *Gamma* suggests you could plead loss causation,
22 which is that there was a persistent, long-term impact from
23 defendants.

24 Oh, I should point out, by the way, that in *Harrington*
25 the window of time between the sales by the company and the

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1 spoofing was 15 minutes, and *Harrington* said that that was
2 sufficient.

3 With regard to the persistent point, we cite to the
4 expert report of a Nobel Prize-winning economist, submitted in
5 a market manipulation case which references and cites to
6 extensive market microstructure literature, which supports the
7 idea that defendants' spoofing in this case was, in fact,
8 persistent. This is paragraph 60 of our complaint. And
9 defendants have no response to that other than saying that
10 spoofing must only have an effect of one to two minutes.
11 There's nothing in the case law that suggests that, including
12 *Gamma*. And so I think we meet both criterions for spoofing,
13 but I think even more importantly, this is a Rule 8 pleading
14 standard. This is certainly going to be the subject of
15 heightened and, I imagine, somewhat heated debate when we get
16 to the expert phase of this case. But it is, I think, well
17 pled for purposes of surviving the motion to dismiss here.

18 THE COURT: With regard to the long-term effect, *i.e.*,
19 throughout the entire period, the price did double. Are you
20 alleging that the price at the end of the five-year period was
21 artificially depressed as a result of the spoofing?

22 MS. POSNER: We are alleging that.

23 So, what's interesting in this case, typically in
24 spoofing cases you see the price being spoofed up and down.
25 Not always but a lot of the times. Here, all of the spoofing

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1 is one direction, and it's down. And when you, at least my
2 kind of nascent understanding of the economic theory is that
3 when you have multiple and persistent -- in this case, we have
4 thousands and thousands and thousands of baiting orders pushing
5 the price only in one direction over a sustained period of
6 time -- that that has an impact on the stock price over time;
7 that it kind of is additive over time when it's only moving in
8 one direction and the market tends to believe that the market
9 will continue moving in that direction even beyond the specific
10 spoofing episode or the 15 minutes after the specific incident
11 occurs. But again, I don't fancy myself a real economist. I
12 think this is something that would be subject to expert
13 testimony. I do think for purposes of pleading standards we
14 plead it sufficiently in this case.

15 THE COURT: Does the report you refer to support that
16 long-term allegation over the five-year period or just that in
17 a given spoofing episode the effects can persist for longer
18 than defendants contend but still would be measured in a matter
19 of --

20 (Indiscernible overlap)

21 MS. POSNER: Sure.

22 THE COURT: The success of the scheme, at least with
23 regard to an individual spoofing episode, depends on the
24 spoofing effect dissipating, does it not?

25 MS. POSNER: Potentially depends on the short position

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1 in the case and in the security as well.

2 THE COURT: In this case --

3 MS. POSNER: We don't know the short positions.

4 (Indiscernible overlap)

5 THE COURT: Allegations about --

6 MS. POSNER: Because we have no way to have access to
7 that information absent discovery. But I think there are
8 different transactions and positions that could impact that.

9 But it also could be short-term additional gain when they sell
10 at a profit a few days after a spoofing episode occurs, kind of
11 a churning effect, one after the other, one after the other.

12 Kind of like what you see with wash sales or churning
13 otherwise. It's the same conduct and kind of doing it over and
14 over again in little bits of time over a longer period of time.

15 And I'll just point out, I think, because there's some
16 kind of visceral, I think, reaction to the fact that the stock
17 price did go up a little bit. We're talking, by the way, about
18 a penny stock. We're not talking about it went from 100 to
19 \$200. We're talking less than, like, a dollar to two dollars,
20 if that, which it did not. But the expectation -- right --
21 this is a company that has successfully passed a phase III
22 trial for a personalized cancer vaccine that has demonstrated
23 that it significantly, and statistically significantly, can
24 extend life for patients with glioblastoma. They believe that
25 that same technology can be used for all cancers. The idea

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1 that somehow the stock price in this company would not reflect
2 positively to that type of information coming out into the
3 market but basically be stymied or flat or, you know, little
4 bumps and go back down almost immediately thereafter is not
5 reflective of a market that is truly reacting to positive news.

6 THE COURT: So you're arguing that the market is
7 inefficient here?

8 MS. POSNER: No. As the courts are very clear about
9 with regard to market manipulation cases, the question, as *Set*
10 *Capital* holds in the Second Circuit, the question is whether
11 the price is reflective of true supply. The question is not
12 whether the stock price has to react in a specific way to
13 positive or negative news. In fact, the Second Circuit, with
14 regard to typical 10b-5 misstatement and omissions cases is
15 very clear that for purposes of proving whether a market is
16 efficient, it doesn't matter even, A, whether you fulfill
17 *Cammer* factor 5, but even if you do that the stock price is
18 reacting in a way that is expected by the market. That's not
19 what's reflective of true market efficiency. So I think the
20 fact that the price is not reflective of true supply and demand
21 does not mean that it is not efficient. That is going to
22 always be the case in a market manipulation case.

23 THE COURT: You certainly aren't alleging that the
24 intent or purposes of the defendants was to cause a long-term
25 depression in the stock price, are you?

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1 MS. POSNER: We don't allege that.

2 THE COURT: OK. I would like to talk to you about
3 the, at least what the defendants characterize as the removal
4 of the prespoofing bid and offer prices from the amended
5 complaint. As I understand it, the original complaint alleges
6 that beginning, let's say, at 2 p.m., here were the best bid
7 and offer and number the shares associated with that and the
8 prices, and that that allegation is made, yeah, as of 2 p.m.,
9 and then the bidding period is alleged to have occurred from 2
10 p.m. to two minutes after 2 p.m., and that allegation stays the
11 same in the amended complaint, and indeed, the prior allegation
12 about what the number of shares involved and the actual prices
13 involved in the best bid and offer also stays the same except
14 the time changes. Now you're alleging that that's the case as
15 of 2:02 rather than as of 2:00, and I don't understand that.
16 First of all, why did you remove the allegation and that those
17 were the bid and offer as at what I'm saying 2:00 --

18 MS. POSNER: Yeah, yeah.

19 THE COURT: And how can it be that it was the same at
20 2:00 and at 2:02?

21 MS. POSNER: So, I think there are two specific, like,
22 different issues here. The point that you were making was not
23 the result of an amendment. The exhibit just had a
24 technological problem, and there was some -- I believe prior to
25 your Honor being appointed to this case, there were some

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1 letters back and forth with regard to that exhibit.

2 Essentially what had happened --

3 THE COURT: This is the exhibit attached to the
4 original complaint.

5 MS. POSNER: Yeah, exhibit 1. Essentially, the table
6 got, like the columns got set off a little bit, and it messed
7 up the whole table. So they weren't reflective of the actual
8 information. We did not amend that at all other than to fix so
9 that the times were correct. I don't think that's what the
10 defendants are arguing about with regard to the amendments.

11 It is true that once we received what we think are
12 completely without basis Rule 11 letters, that we made some
13 amendments to the actual substantive allegations in the
14 complaint, and we did that not because they pointed out
15 information that we got wrong in the complaint. I think that
16 they were focusing on issues that were not germane to our
17 allegations and that were not reflective of the specific
18 pleadings we were making. So they were making the point about
19 the fact that we removed the time -- sorry, or the stock price
20 change between the beginning of the spoofing episode and the
21 end of the spoofing episode.

22 That is, in fact, true. We didn't do it because it
23 was wrong. It was the correct prices. We did it because what
24 we are alleging and what we continue to allege is that they
25 artificially depressed the price. The fact that the stock

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1 price changed from X to Y is not necessarily indicative of the
2 true impact of the spoofing on the price and the decline in the
3 value of that share as a result of the spoofing. And we
4 specifically show that in each of the 16 examples.

5 We also then use the peak to trough analysis to
6 supplement that analysis as well, but we don't believe we have
7 any obligation, and I don't think it is necessarily reflective
8 of impact for a stock price to change from X to Y in and of
9 itself. So I think those are just, if I understood your
10 question correctly, I think those are two different things. We
11 did not change anything about the times, amounts, shares or
12 anything. It was just when we had to correct that exhibit, we
13 filed a corrected version of exhibit 1.

14 THE COURT: All right. First of all, I'm being told
15 that there was no exhibit to the original complaint.

16 MS. POSNER: Yeah. I'm talking about for the second
17 complaint. When we initially filed the second amended
18 complaint, there was an exhibit attached. We then submitted a
19 letter to the Court saying the exhibit was messed up, and then
20 we submitted a corrected version of that exhibit.

21 THE COURT: OK. I think that's neither here nor
22 there. I'm talking about the change between the original
23 complaint and the amended complaint, where, for example, on the
24 October 12, 2020, transaction, when you get to paragraph 74 in
25 the original complaint -- well, let me just start with

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1 paragraph 75. That stays the same.

2 Paragraph 75 becomes paragraph 84 of the current
3 complaint and, I think, is identical, but the prior paragraph,
4 which is 74 in the original complaint and 83 in the amended
5 complaint, in the original version it alleges that on October
6 12, 2020, at 141825, which is the beginning of the baiting
7 period or the baiting order period as described in paragraph
8 75, the best bid and offer was a bid to purchase 5,000 shares
9 at a price of \$1.02 and offer to sell 100 shares at a price of
10 \$1.04. When we get to the amended complaint, all those numbers
11 I mentioned in what is now paragraph 83 are the same except
12 that that allegation is made as of 142025, the end of the
13 baiting period.

14 MS. POSNER: Yes. I apologize, your Honor. I thought
15 you were talking about the exhibit changes. I misunderstood
16 your question.

17 It is true. There were, I think, a handful -- and I
18 don't remember the specific numbers; I apologize -- of
19 instances in which when we were preparing for and cite checking
20 the amended complaint, we noticed that there were some
21 typographical issues with regard to the time. Some of those
22 might actually have been brought to our attention by the
23 defendants in their Rule 11 motion. I just don't know the
24 specifics offhand. I can assure your Honor, though, that it
25 was not an intent to change anything because we thought we were

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1 obfuscating anything. It was truly a reflection of errors as
2 originally pled.

3 THE COURT: Well, I haven't checked all 16. I only
4 checked this one and the next one, but the next one is the same
5 thing. The allegation is changed, you know, the first
6 paragraph only in respect of the time and it's now alleged that
7 those were the bid and asks at the end of the baiting period
8 rather than the beginning. Did that happen in each of the
9 other 16 episodes? As I said, I haven't checked, so I don't
10 know.

11 MS. POSNER: I apologize, your Honor. I have not done
12 a redline to compare them and I, quite frankly, just don't
13 recall from when we originally made the amendments. I do
14 recall that we had identified some errors that we were trying
15 to fix that were in the initial complaint, as drafted, and
16 that's why it was corrected in the amended complaint. But I
17 don't recall the specifics. I do feel confident that the
18 allegations in the amended complaint are accurate.

19 THE COURT: So you're saying the original complaint on
20 the October 12, 2020, transaction was inaccurate, that those
21 were not --

22 MS. POSNER: I believe the time was inaccurate, if I
23 recall correctly.

24 THE COURT: But what is the point of alleging what the
25 best bid and offer were at the end of the baiting order period?

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1 I don't understand that. I can see why you would want to
2 allege, as you did allege in the original complaint, what they
3 were at the beginning, because it's like a chronology. Here
4 was the price, then they baited and the price went down. I
5 don't understand.

6 MS. POSNER: I don't think it's that -- if I
7 understand your Honor's question correctly, I don't think it's
8 that one goes from the beginning to the end. I think the time
9 was wrong as originally pled, and that is what changed.

10 THE COURT: But I'm asking a different question.

11 MS. POSNER: OK.

12 THE COURT: Why allege what the bid and offer was at
13 the end of the baiting period? What's the significance of that
14 allegation?

15 MS. POSNER: You mean to know what it was as it
16 progressed throughout the spoofing episode?

17 THE COURT: Why is paragraph 83 in the amended
18 complaint?

19 MS. POSNER: So I think the point, if I'm
20 understanding your Honor correctly, you're asking why did we
21 plead the facts set forth in paragraph 83?

22 THE COURT: Yes.

23 MS. POSNER: I think it's to show the impact on the
24 stock price and where it moves as a result of the baiting.

25 THE COURT: OK. Is that consistent with the

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1 allegations in *Harrington*?

2 MS. POSNER: Yes, your Honor.

3 THE COURT: You're saying if I look at the *Harrington*
4 complaint, they will also allege what the best bid and offer
5 were at the end of the alleged baiting offer period rather than
6 at the beginning?

7 MS. POSNER: So, I think, two things.

8 One, I think our allegations are much more detailed
9 than in *Harrington*. But putting that to the side, I think they
10 do the same thing. They are showing the impact and price
11 movement of the shares as a result of the spoofing transactions
12 by the defendants and what the best, what the ultimate best bid
13 and offer is as a result of those baiting orders.

14 THE COURT: OK. Putting aside the issue of the change
15 in the complaints, is it correct, as your adversary says, that
16 you don't allege what the pre-spoofing price was, and isn't
17 that critical, important, necessary for a spoofing claim?

18 MS. POSNER: It is correct that we don't include that
19 information. I do not believe it's correct that it is
20 required. What is required is that we allege that the conduct
21 depressed the price below its natural price as a result of the
22 spoofing activity. You see in *Set Capital*, the Second Circuit
23 says for market activity to artificially affect a securities
24 price, we generally ask whether the transaction or series of
25 transactions sends a false pricing signal to the market or

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1 otherwise distorts the underlying economic value of the
2 securities trading.

3 That's not suggesting that we have to show that the
4 stock price moved from X to Y. We just have to show that the
5 pricing signal that is reflected in the best bid and offer is
6 not truly reflective of the actual underlying economic value of
7 the shares. And I should point out that for each of the 16
8 examples and in each of the instances in exhibit 1, we
9 demonstrate how the baiting orders allowed them to obtain the
10 executing purchases at a price below the prevailing best offer.
11 And that is direct evidence of the price decrease caused by
12 their specific spoofing allegations. We then obviously also do
13 the peak to trough analysis, but we are providing the direct
14 evidence of the impact of their spoofing on the price, which is
15 demonstrating the price was not reflective of true supply and
16 demand. It was less than it should have been, and by how much.

17 THE COURT: With respect to peak to trough analysis,
18 that's your price decline formula, right?

19 MS. POSNER: One of. As I said, we show the actual
20 physical price decline from \$1.05 to \$1.03 as a result of the
21 spoofing as well, which is direct evidence of it, but we also
22 do the peak to trough analysis as well.

23 THE COURT: And is Mr. Burck correct when he says that
24 under that formula, even when the price went up, your formula
25 would spit out a decline?

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1 MS. POSNER: Incorrect. If you look at footnote 43 of
2 our brief, this is on page 27, we specifically give an example.
3 We say if the share price increased from \$10 during the two
4 minutes before the executing purchase to \$11 during the two
5 minutes after the executing purchase, then the peak to trough
6 calculation would actually be zero.

7 It is, in fact, the case that each of the instances
8 alleged in the complaint show a peak to trough decline, but
9 that's because we are only alleging those instances in which
10 there was a price decrease or a decline as a result of the
11 spoofing activity. There are lots of other transactions in the
12 market that did not cause this impact and were not unlawful
13 spoofing activity. We didn't allege those in the complaint.
14 That would be improper. So yes, all of our examples show a
15 peak to trough decline, but it is not the case that any
16 transaction or any difference in price would always show a peak
17 to trough decline in the stock price.

18 THE COURT: Was I correct when I posited to Mr. Burck
19 that if the price actually did go up under your formula, the
20 result would be a zero?

21 MS. POSNER: Yes. That is correct.

22 THE COURT: Seems like something we should all be able
23 to agree on.

24 MS. POSNER: You're right.

25 THE COURT: Is your formula X minus Y all above the

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1 line over 1 or is it X over Y minus 1?

2 MS. POSNER: It's X over Y minus 1, if I have this
3 correctly. And actually, it's also in -- we have it in more
4 detail in footnote 1 to exhibit 1. Might be the same rather
5 than more detail. It might be actually the same as what I just
6 read to you but in a different place, not more detail. But if
7 I understand it correctly, it's X over Y minus 1.

8 THE COURT: So it's a little line, X with a Y
9 direction underneath separated by line and then you take
10 whatever the product of that is and then you subtract 1 from
11 it.

12 MS. POSNER: I believe that is correct. Are you
13 comparing that as to the slide in the defendants' presentation?

14 THE COURT: I'm just asking you what your formula is.

15 MS. POSNER: Yeah, I believe that is an accurate
16 reflection of the formula. But I'm just trying to understand
17 what you're seeing that is different than that, and that's what
18 I was trying to find out.

19 THE COURT: Well, it's ambiguous. It could be X minus
20 Y, so you subtract Y from X and then you divide that by 1.

21 MS. POSNER: No. It's X over Y minus 1.

22 THE COURT: OK. And I thought that's what Mr. Burck
23 used in his example, but he showed me, or at least I was
24 persuaded at the time, that you could have an increase in the
25 stock price but it would look like a negative. What was wrong

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1 about -- and perhaps Mr. Burck could tell us what slide it was.
2 Was it on a slide?

3 MR. BURCK: Yes, it was.

4 MS. POSNER: Slide 29.

5 THE COURT: Can we put that up?

6 MR. BURCK: Yes, your Honor.

7 MS. POSNER: This is also a different footnote in our
8 opposition brief. This is footnote 55.

9 THE COURT: Uh-huh.

10 MS. POSNER: And we describe here that, again, the
11 same fact pattern, 10 to \$11 during the two minutes before and
12 after. The price decline in that example would be 10, divide
13 by 10 minus 1 equals 1 minus 1 equals zero. In other words,
14 the price decline is defined such that when the price increases
15 from before and after the executing purchase, the price decline
16 is zero.

17 THE COURT: So applying that to Mr. Burck's example,
18 did he misunderstand it in your formula?

19 MS. POSNER: Apologies. I'm clearly not an economic
20 economist and all the more reason why loss causation is left to
21 the experts, but what I think is inaccurate about this slide is
22 the 2. It should be a 1 in this fact pattern. You're looking
23 at two minutes before, two minutes after.

24 THE COURT: Just the way it's ten and ten in your
25 example.

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1 MS. POSNER: Correct. Correct.

2 So I think what's wrong about this is it's not
3 accurately reflecting the formula. It should be a 1, not a 2
4 there --

5 THE COURT: OK.

6 MS. POSNER: -- to be accurate.

7 THE COURT: That's correct.

8 We're going to need to wrap this up. I don't know
9 that I have any more questions for you, Ms. Posner. Is there
10 anything else that you would like to say?

11 MS. POSNER: Nothing further at this time, your Honor.
12 I'll see if there's anything after Mr. Burck gets back up here.

13 THE COURT: Sure.

14 Mr. Burck, you have five minutes.

15 MR. BURCK: I'll be very, very brief.

16 THE COURT: Or less.

17 MR. BURCK: Your Honor, this is a formula. Right? So
18 the idea that we put in the wrong numbers is the reason why the
19 formula doesn't work is obviously not -- it doesn't make any
20 mathematical sense. In other words, this is the formula they
21 put in their brief, their complaint, X, smaller number, divided
22 by Y, larger number, minus 1, equals whatever it's going to
23 equal.

24 THE COURT: She's saying you should put the 1. But
25 there's no way we can sort this out here and now. I have a

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1 fair amount of confidence that between me and my law clerk we
2 can figure that out.

3 MR. BURCK: Understood.

4 THE COURT: If we need help, we'll ask for help.

5 MR. BURCK: OK, your Honor.

6 Just on the point that the Court was focusing on with
7 respect to the difference between *Harrington*, the starting
8 price, what actually happened, Judge, is, and this is what you,
9 I think, were getting to, was that the original complaint had a
10 number in it as a starting number, which makes sense, as the
11 Court said. Then the amended complaint, the starting number
12 disappears and it's just the end number, which the Court, of
13 course, pointed out, why does that matter. We'll explain in a
14 minute how that happened, but that's also completely different
15 than *Harrington*. *Harrington* has a starting point price and it
16 has a specified loss amount or decline amount, I should say,
17 for the baiting period alleged.

18 Neither is alleged here, and the reason why it's not
19 alleged is because the plaintiffs figured out that the number
20 they had in their original complaint was wrong. And if you put
21 in the right number from the public data, which is on one of
22 the slides we had, and we could flash that up, that you had the
23 opposite effect. It's not a baiting moment. You have the
24 exact opposite of a spoof. And that was the slide we went
25 through, your Honor, that said the reason why they excluded it,

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1 your Honor, is because it completely destroys their theory.

2 Your Honor, this is the slide. This is 27. The
3 original complaint had a wrong number, 1.02, 1.04. We told
4 them it was wrong. We told them what the right number was,
5 .995 or 1. So the executing purchase price was 1.02. It's the
6 exact opposite of what you would have in a spoof.

7 So what they did in the amended complaint was simply
8 take it out. So that's why that happened, your Honor. And the
9 reality is that *Harrington* specifically in that case, defendant
10 has a baiting, spoofing start number, has a price decline
11 allegation, neither of which exists in this case.

12 So your Honor, just a final point that if you don't
13 know what the price was supposed to be at the beginning, like
14 what the baiting price was or where things all start from, how
15 do you know where you're ending up? How do you know if you
16 have a price increase, decrease, it stays flat? You have no
17 idea, because we don't know where we're starting from.

18 THE COURT: You don't, but if you have a gazillion,
19 and I'm not being literal, canceled orders and a gross
20 imbalance in the sell side versus the buy side on the book and
21 some of the other factors that plaintiff has talked about, it
22 seems like you could infer that there was an intent to drag
23 down the price.

24 MR. BURCK: Well, your Honor, that would mean --

25 THE COURT: Even if there's no specific allegation of

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1 what the price was initially.

2 MR. BURCK: Well, your Honor, I think that that, I
3 don't think that the law suggests that the mere fact of a large
4 number of cancellations -- let's assume that's what happened --
5 is sufficient to say that there's spoofing, there's an effort
6 to drive down the price. It has to be combined with all the
7 other factors that go into it --

8 THE COURT: Yes.

9 MR. BURCK: -- including a price number. Judge, for
10 example, in this particular instance, we actually know that
11 despite the alleged imbalances and the cancellations, the price
12 went up double during that period.

13 THE COURT: That's the long term. That's irrelevant.
14 I'm not focused on that. I'm focusing on the spoofing
15 episodes.

16 MR. BURCK: Judge, even in the spoofing episodes, we
17 look at the number, the actual, the best offer, and this is
18 their theory. Right?

19 THE COURT: You haven't shown that to me, and we
20 haven't even talked about -- I don't know how I can rely on
21 that on the trading data, just because it's publicly available.
22 Do you have a case where anything like that was done? Don't
23 cite a contract case where the court looked at the entire
24 contract.

25 MR. BURCK: Judge, we can certainly look for one. We

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1 can certainly look for one.

2 But judge, one point, just the last point is that they
3 know the starting price, your Honor. They know what it is.
4 They can find it. We told them what the starting price was in
5 this chart. They didn't include it because it completely
6 undermines their theory of the case. The number cannot be --
7 this cannot be a spoofing episode if the price started out at
8 .995 to 1 and the executing purchase price was \$1.02.

9 THE COURT: You're assuming reasonably enough given
10 the plaintiff's allegations that the baiting order period was,
11 in fact, that the baiting started exactly two minutes -- or
12 lasted exactly two minutes.

13 MR. BURCK: That's what they say, your Honor.

14 THE COURT: I understand, but I didn't ask plaintiff's
15 counsel, but I will. Frankly, I will now.

16 I think it's more efficient, Ms. Posner, if you just
17 answer this question now, but I mean I think that's the
18 allegation for each of the 16 episodes, that it was a
19 two-minute baiting order period. Do I take that literally, or
20 were you using two minutes as some sort of proxy and, in fact,
21 the baiting orders took place at different times within the
22 two-minute period; they may not necessarily have started at
23 what the complaint, frankly, suggests is the start period.

24 MS. POSNER: So, your Honor, there are, as we allege,
25 I think, over -- we were talking hundreds of thousands of

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1 bidding orders.

2 THE COURT: I'm talking about the 16.

3 MS. POSNER: No. I understand.

4 What I'm trying to explain is that there are numerous
5 ways in which you could start and stop the baiting orders.

6 It's not as if this is a static market in which they only
7 operate in specific chunks. We used what we see as a
8 conservative methodology, used actually in expert reports
9 submitted in a number of these spoofing cases, to look at a
10 window of time and see the impact of the baiting orders on the
11 price of Northwest Bio. We would otherwise have to include in
12 the complaint literally thousands and thousands and thousands
13 of pages of transactions in order to show every single order
14 that's coming through at any given point in time, and we
15 wouldn't have a fair representation of what the impact is
16 unless we were to look -- you know, we could look at a
17 five-year period, I suppose, but I don't think that's helpful
18 to the Court and I don't think that's how spoofing cases have
19 been alleged in the past.

20 THE COURT: So when you allege, for instance, with
21 regard to the October 12 example episode, that from 141825 to
22 142025 defendant Citadel placed 10,850 shares of baiting
23 orders, you don't mean to allege, despite the language, that
24 they placed the first baiting order at 141825 and the last one
25 at 142025.

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1 MS. POSNER: Correct.

2 THE COURT: You just mean that there were baiting
3 orders within that range.

4 MS. POSNER: Correct. We used the same two-minute
5 window, and I think we have a footnote explaining that. I
6 don't have it off the top of my head, why we picked that and
7 that we used it consistently throughout.

8 THE COURT: Thank you.

9 In light of that, Mr. Burck, is there anything further
10 you want to say on this subject? I guess my question would be
11 given that, isn't the price as of, I assume this is what's
12 reflected in the middle of your chart, at 141825 not so
13 significant?

14 MR. BURCK: Well, your Honor, we totally disagree,
15 because again, we don't even -- the only price that's alleged,
16 now, is the one at the end, right? After this period is over.
17 So again, we have no idea where the price went unless you
18 actually look at the price, and when you do, and they allege
19 the baiting period starts at a particular split second and you
20 look at the price, then you look at what the executing price
21 was and then you see what happened to the price. It's very
22 simple.

23 And instead, what they did, your Honor, with every
24 single example -- I know they alleged hundreds of thousands
25 examples. They presumably they took the best ones, if they

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wanted to prove to the Court they had a good case, they took the 16, originally had starting numbers for each of the 16, and they ripped them all out. Now, every one of the examples has an end point and no beginning point. It's just a fundamental logical problem, which is you can't allege -- well, you can allege anything you want. You can say the price went down, but we actually -- this is a knowable fact, and they exclude the information because the information, if they use it, will show that their entire theory crumbles at the very threshold, because they cannot -- they cannot -- give us, they cannot give the Court the starting price because if they give the Court the starting price, there's no baiting. Nothing happens even consistent with what they've alleged.

Instead, they rely on a general statement that we have alleged that the baiting happened, there were cancellations, which they don't actually allege a specific cancellation, here's the things that we hit using the standards that are out there, and they throw out a lot of charts, a lot of big numbers. But when you actually go into the specifics and take a look at what they are alleging examples that they chose, it's missing the first thing that you need to know, which is where did we start? Right? How is the Court going to decide what happened if you don't know where we started? How can you determine a price decline or an increase?

I won't belabor the formula, but it goes to the

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1 formula. The formula itself is basic math, X divided by Y, X
2 has to be lower than or equal to Y minus 1 where maximum equals
3 zero. That's the max.

4 THE COURT: We've discussed this.

5 MR. BURCK: Your Honor, the point is that they're
6 hiding the ball from the Court in a fundamental way, which is
7 there's no way to know what actually happened if you take away
8 the price. They know what the price is. They don't want the
9 Court to see it because that undermines their case.

10 THE COURT: One last question. Your exhibits that
11 have the publicly available quote data, is that a clean
12 document, or is that something that was literally printed out
13 from OTC Link?

14 MR. BURCK: That was downloaded from OTC Link.

15 THE COURT: As is.

16 MR. BURCK: As is.

17 THE COURT: OK.

18 MR. BURCK: Your Honor, one other point, just to
19 clarify.

20 You asked us about *Harrington*, did the plaintiff
21 allege that there were the same clients on both sides. They
22 did not. They did not make that allegation, but the court
23 found and you went into this with plaintiff's counsel, that
24 there were some differences in what they alleged as to reckless
25 behavior, including saving costs with respect to the

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1 cancellations, which they don't allege against us, but the
2 plaintiff in that case did not allege the client had to be on
3 both sides. I just wanted to clarify that.

4 THE COURT: Thank you for that clarification.

5 OK. Thanks, everyone. Have a good day.

6 (Adjourned)

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